Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY CICCONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Hobbs Act defines "extortion" as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court held that extortion must involve actual "obtaining of property," rejecting lesser definitions of coercion, regulation, or frustration of property interests. This Court considered but left for another day the companion question of the line between liberty and property interests under the Hobbs Act, and whether and to what extent intangible interests such as control over assets qualify as property under the Act. *Id.* at 401 & n.5.

1. Whether the Second Circuit, in addressing the question left open in *Scheidler*, correctly held that intangible property interests, in particular, the rights of union members to free speech, democratic participation and disinterested union representation, constitute "property" under the Hobbs Act, and if so, whether such rights are "obtainable." The decision below stands in conflict with this Court and several courts of appeal concerning the meaning of "property" under federal law, and in conflict with *Scheidler* over the "obtaining" requirement and the propriety of "expansive" construction of the Hobbs Act.

2. Whether the Second Circuit, in conflict with several circuits, correctly held that payments may be deemed to have been extorted under the Hobbs Act, on the basis of generalized suspicion of illegality and defendant's failure to proffer a legitimate explanation for them, notwithstanding the absence of any evidence of fear by the payer or the purpose of the payments.

3. Whether the Second Circuit, in conflict with *United States v. Cabrales*, 524 U.S. 1 (1998), correctly held that for purposes of satisfying the interstate commerce element on money laundering charges under 18 U.S.C. § 1956, the underlying criminal activity – as opposed to the laundering itself — can be considered.

STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

In addition to petitioner Anthony Ciccone and respondent United States of America, parties to the proceeding in the Court of Appeals also included Peter Gotti, Richard Bondi and Richard G. Gotti.

The parties have no parent or subsidiary companies and do not issue stock.

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OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), and is reproduced in the appendix hereto at App. 1a-113a. The order denying rehearing is unreported but is reproduced at App. 123a. The district court's denial of defendant's motion to dismiss before trial is unreported but a relevant excerpt from the bench is reproduced at App. 114a-115a. The district court's denial of the motion of all defendants for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure is unreported but a relevant excerpt from the bench is reproduced at App. 116a-122a.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2006, and rehearing was denied on October 19, 2006. App. 1a, 123a. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Title Eighteen, Section 1951 of the United States Code reads in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *

> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

Absent this Court's intervention, the decision below portends a serious expansion of criminal liability for extortion under the Hobbs Act, 18 U.S.C. § 1951 — to include deprivations of interests having the most remote nexus to "property," and on proof of little more than unexplained, suspicious activity. Petitioner seeks review of the ruling of the Second Circuit Court of Appeals that the rights of union members to free speech, democratic procedures and disinterested representation constitute "property" that can be "obtain[ed]" within the meaning of extortion in the Hobbs Act, 18 U.S.C. § 1951(b)(2). Petitioner also seeks review of the court of appeals' ruling that unexplained but "suspicious" payments without evidence of fear by the payer or the purpose of the payments can allow a jury to find extortion. Lastly, Petitioner seeks review of the court of appeals' holding that for purposes of establishing an impact on interstate commerce in a money laundering case, the underlying criminal activity, as opposed to the financial transactions said to constitute laundering, may be considered.

A. The *Scheidler* Decision

Because much of the case background involves this Court's decision in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003),[1] the decision, handed down while summations were occurring at the end of the trial below, is summarized here.

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[1] This is the second of three decisions by this Court in the *National Organization for Women, Inc. v. Scheidler* litigation. The first, often

(Cont'd)

In *Scheidler*, this Court held that extortion under the Hobbs Act requires proof that the property in question was actually "obtained," meaning that there was "both a deprivation and acquisition of property." *Id.* at 402-04. The case concerned anti-abortion protesters charged with extorting the property rights of patients to seek services in clinics and of doctors, nurses and other staff to work "free from wrongful threats, violence, coercion and fear." *Id.* at 400-01. Despite the straightforward statutory definition of extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," 18 U.S.C. § 1951(b)(2), lower courts, led by the Second Circuit's "admittedly expansive" interpretations of property and obtaining, had held, *inter alia*, that obtaining of property was not strictly necessary. *See United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999). Although the Court granted certiorari to consider both the nature of "property" under the Hobbs Act and whether such property must be "obtained," the Court decided the case on the "obtaining" issue, declining to decide whether the rights in question constituted property. *Id.* at 401-02.

The central holding of *Scheidler* is that the Hobbs Act literally requires "the obtaining of property," meaning that the offenders "could exercise, transfer or sell" the property in question:

> [E]ven when . . . acts of interference and disruption achieved the[] ultimate goal of 'shutting down' a

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(Cont'd)

known as "*Scheidler I*," is *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994). The third, often known as "*Scheidler III*," is *Scheidler v. National Organization for Women, Inc.*, 126 S. Ct. 1264 (2006). Although the case cited in the text is often known as *Scheidler II*, and is so described in the court of appeals' decision, unless context otherwise requires, it is simply described here as "*Scheidler*."

> clinic that performed abortions, such acts did not constitute extortion because petitioners did not 'obtain' respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received 'something of value from' respon ents that they could exercise, transfer or sell.

Id. at 404-05. *Scheidler* repudiated the reasoning of the Second Circuit in *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999), which had read the word "obtain" to go beyond "to gain or attain the possession or disposal of" to a broader notion of "the regulation of the fate . . . of something." This Court concluded that strict construction of criminal statutes requires a more familiar meaning of the word "obtain" than regulation of the fate of property. 537 U.S. 403 at n.8, 408.

By the same token, this Court reasoned that to permit a Hobbs Act extortion charge to rest only upon a showing of interference with another's rights would

> eliminate the recognized distinction between extortion and the separate crime of coercion . . . [T]he crime of coercion, which more accurately describes the nature of petitioners' actions, involves the use of force or threat of force to restrict another's freedom of action.

Id. at 406. The Court emphasized that coercion statutes at the time of enactment of the Hobbs Act authorized "prosecution of individuals who, like petitioners, employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses." *Id.* The Court cited examples of cases under the New York coercion statute, such as coercion of a business to

join a trade association, or to compel a manufacturer to enter into an agreement with a labor union, or to compel union members to drop lawsuits regarding union finances. The Court found it significant that in enacting the Hobbs Act and modeling it on New York law, Congress chose to prohibit extortion, but *not* to prohibit coercion. *Id.* at 405-06.

Other than to note the Solicitor General's concession that the right of a woman to seek medical services is a liberty rather than a property interest, the Court declined to "trace the outer boundaries" of the nature of property under the Hobbs Act. *Id.* at 401 & n.5. Thus, the Court did not address cases on this point, such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), which had held that intangible property interests were cognizable under the Hobbs Act, upholding prosecution of defendants for intimidating a rival from soliciting customers on a garbage route. This Court neither approved nor disapproved of *Tropiano*, stating that it is "mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)." 537 U.S. at 402 n.6.

B. Proceedings in the District Court

Prior to any decision in *Scheidler*, petitioner Anthony Ciccone, 72, was named in a multi-count indictment, and is now serving a 15-year sentence issued by the United States District Court for the Eastern District of New York, following convictions on numerous counts.[2] The government's case

2. Defendant was convicted of two counts of conspiring and conducting an enterprise through a pattern of racketeering, 18 U.S.C. § 1962(c),(d); twenty-one counts of extortion and extortion conspiracy, 18 U.S.C. § 1951; twelve counts of wire fraud and conspiracy, 18 U.S.C. § 1343; eighteen counts of money laundering and conspiracy, 18 U.S.C. § 1956; two counts of illegal gambling, 18 U.S.C. § 1955; and one count of witness tampering, 18 U.S.C. § 1512.

consisted of multiple allegations of extortion and fraud against union entities operating along the waterfront in Brooklyn, New York as well as individuals associated with the commerce there. Defendant, previously a lifelong longshoreman and union member and officer, but banned from union positions and affairs by a 1992 consent decree, was alleged to have become a "captain" in the Gambino crime family, and that through "actual and threatened force, violence and fear," the Gambino family together with the Genovese family "exercised influence over labor unions and businesses at commercial shipping terminals in New York and New Jersey." App. 7a.

The gravamen of the government's case consisted of Hobbs Act extortion charges against three union entities, and central among the theories charged in the indictment were that petitioner and others extorted rights of "free speech and democratic participation in the affairs of [a] labor organization as guaranteed by [the Labor-Management Reporting Disclosure Act, 29 U.S.C. § 401 et seq."], or "of rights to have union officials "discharge their duties with respect to the [union entity] solely in the interest of the [entity] and its participants and beneficiaries . . ." App. 6a-13a.

For example, with respect to ILA, the International Longshoremen's Association, the government alleged that the defendants used fear and intimidation "in order to control who filled various International Executive Officer and other ILA positions, and thereby to ensure that organized crime associates would be placed in those positions." At trial, the government cited an alleged agreement allocating to the Gambino family "control" of piers in Brooklyn and to the Genovese family control of piers in Manhattan and New Jersey and that Ciccone, while not a union official, represented the Brooklyn waterfront for the Gambino family and that union officials worked for him. The government contended that defendants extorted from the

ILA membership, *inter alia*, their democratic and free speech rights by attempting to influence officers to support a particular candidate for assistant general organizer at the ILA convention in 2000. No votes were cast by defendants, nor were any actual threats proven. In fact, defendant Ciccone had said to expect the official in question, Harold Daggett, to be elected general organizer when in fact he was elected assistant general organizer. The government's own witness testified that Ciccone had little influence at the 2000 election. *See* App. 6a-9a; Trial Transcript ("Tr.") 850-51.

With respect to MILA, the ILA's health benefits trust, it was alleged that the defendants sought "to ensure" that a particular company was awarded a pharmaceutical contract. The government contended that union democratic rights were extorted in that defendants allegedly sought to influence MILA's award of a health benefits prescription contract to a particular company, GPP/VIP, and to influence subsequent renewal of that contract. Initially, union and management trustees agreed to split the contract between GPP/VIP and another company. Upon renewal, when management recommended another company, the union trustees originally agreed but then withdrew support in favor of GPP/VIP. One union trustee testified that Ciccone wanted him to support GPP/VIP, although that trustee initially supported the other company on contract renewal. The government also introduced co-conspirator statements contending that kickbacks were paid from GPP/VIP to defendant Ciccone. *See* App. 9a-12a.

With respect to Local 1 of the ILA, it was alleged that the defendants sought "to intimidate a Local 1 delegate and other Local 1 officers into deferring to the will of defendants . . . in the conduct of the affairs of Local 1." The government elicited evidence that "Red" Scollo, President of Local 1814, was having problems with a Local 1 delegate and spoke to Ciccone.

Although Ciccone asked co-defendant Cassarino to speak to the delegate, apparently no call occurred, and nothing happened. At another point, Cassarino and co-defendant Bondi waited outside Saccenti's home to speak to him, but Ciccone told them to leave. Scollo also testified that he objected to certain work rule changes implemented by Saccenti and that Ciccone had said the changes should not happen without his approval. No evidence of any threat communicated to the delegate or any other member of Local 1 was taken, nor did any Local 1 member even testify. *See* App. 13a-16a.

Before trial, defendant, relying in part on this Court's grant of certiorari in *Scheidler*, moved to dismiss on the ground that the above-described union interests cannot constitute property nor could they be obtained within the meaning of the Hobbs Act. The district court denied the motion in part on the ground that circuit authority, including *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), allowed the theory. App. 114a-15a.

While summations in the case were in progress, this Court then handed down the *Scheidler* decision. Defendants immediately sought various forms of relief, including a mistrial, objections to the jury charge and renewed motions to dismiss pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The district court denied these motions. The court held that, unlike the abortion rights at issue in *Scheidler*, the defendants in this case, obtained the rights to union democracy. Among other things, defendants also sought dismissal under *Scheidler* in post-trial motions. The district court held (App. 116a-122a) that there were valid property interests, although it questioned whether "at some future time some court may say that intangible property rights do not extend to freedom of speech or the exercise of democratic voting rights, I don't know." App. 118a. The court went on to say that this property had been "obtained" by the defendants and that defendants exercised those rights for their own gain. *Id.*

C. Proceedings in the Court of Appeals

In a lengthy opinion (App. 1a-113a), the Second Circuit Court of Appeals affirmed the convictions,[3] and rejected, *inter alia*, petitioner's argument that *Scheidler* required reversal of numerous counts, including those alleging extortion of union democratic rights.[4] Petitioner challenged whether the union democratic rights constituted "property" under the Hobbs Act and also whether they could be "obtained" under the Hobbs Act, particularly in light of this Court's decision in *Scheidler*.

In *Scheidler*, as described above, this Court granted certiorari on the same two issues in a case concerning anti-abortion protesters charged with extorting the property rights of patients to seek services in clinics and of doctors, nurses and other staff to work "free from wrongful threats, violence, coercion and fear." 537 U.S. 400-01. This Court held that extortion under the Hobbs Act requires proof that the property in question was actually "obtained" rejecting lesser theories of "coercion" and repudiating the reasoning of *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999), which had read the word "obtain" to go beyond "to gain or attain the possession or

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3. The Court of Appeals remanded for resentencing in light of this Court's intervening decision in *United States v. Booker*, 543 U.S. 220 (2005). App. 112a. Resentencing has not yet taken place. Consequently, no sentencing issues are raised here.

4. Although the affected counts charged extortion of other interests as well, because the jury did not specify which theory it upheld, the counts required reversal in their entirety. Petitioner maintains that other counts are affected by *Scheidler* even though they do not charge extortion of union democratic rights. These include the "right of [Tommy Ragucci] to be an employee of Howland Hook Container Terminal," "the right [of Aleyev] to conduct a business free from outside pressure . . . and the right to sell a business free from outside pressure," or "the right [of Steven Seagal] to make business decisions free from outside pressure" App. 59a-61a.

disposal of" to a broader notion of "the regulation of the fate . . . of something." Despite including it in the certiorari grant, this Court did not address the "property" issue, stating that it is "mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)." *Scheidler*, 537 U.S. at 402 n.6.

Strangely, despite the overturning of *Arena* and this Court's declination to even address *Tropiano*, in this case, the court of appeals "believe[d] that the appropriate interpretation of *Scheidler II* must be one that co-exists with *Tropiano*." App. 52a. The court of appeals even went so far as to suggest that this Court had "indicated that *Tropiano* remains good law notwithstanding *Scheidler II*." App. 55a.

With the task thus defined, on the "property" issue, the court of appeals invoked *Tropiano*'s broad conception that "The concept of property under the Hobbs Act . . . is not limited to physical or tangible property or things but includes, in a broad sense, any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property." App. 47a (*quoting* 418 F.2d at 1076). Relying on *United States v. Bellomo*, 176 F.3d 580, 592-93 (2d Cir. 1999) and without any analysis, the court of appeals then simply concluded that the union democratic rights fell under *Tropiano*'s broad conception allowing intangible property to constitute "property" within the meaning of the Hobbs Act. App. 46a-48a. Later, without addressing whether union democratic rights can be property, the court of appeals reiterated its view of *Tropiano*'s continuing validity and held that "intangible property rights can qualify as extortable property rights." App. 52a-53a.

Turning to the obtaining issue, the court of appeals deemed it "a two-part inquiry that requires both a deprivation and an acquisition of property," App. 53a, and that the key concept is

this Court's statement that the defendants in *Scheidler* "neither pursued nor received something of value from respondents that they could *exercise, transfer, or sell* ." *Id.* (*quoting Scheidler*, 537 U.S. at 405)(adding emphasis). Again invoking the objective of reconciling *Scheidler* with its own 1969 decision in *Tropiano*, the court of appeals concluded that whereas in *Scheidler* the protesters simply tried to stop the abortion clinic patients from exercising their rights but did not try to exercise them themselves, in *Tropiano* the defendants did more than try to stop the rival from soliciting customers, but rather, sought to retain that right for themselves. App. 55a-56a.

Applying this reasoning to this case, the court of appeals concluded, *inter alia*, that union democratic rights can be "obtained" under *Scheidler*. The court reasoned that defendants "sought to exercise those rights themselves, by telling various delegates whom to vote for in certain leadership positions, and by controlling various elected officials' performance of their union duties." App. 57a. The court extended its conclusion to the other *Scheidler* based claims, App. 57a-61a. The court also rejected various other arguments advanced by the appellants, and, save for sentencing remands (App. 112a), affirmed the convictions of all defendant-appellants.

REASONS FOR GRANTING THE PETITION

This case presents issues that satisfy this Court's traditional criteria for review in that they are important, recurring and pose conflicts with decisions of this Court and of other lower courts. The issues arise principally under the Hobbs Act which severely punishes robbery and extortion affecting interstate commerce and which, under the holdings of the court of appeals, would threaten to become an expansive statute of uncertain contours that could easily be made applicable to unexpected or even ordinary behavior. The first issue, whether union democratic rights constitute "obtainable property" under the

Hobbs Act, includes a question on which this Court previously granted certiorari in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) but without resolving the issue – what constitutes "property" under the Hobbs Act. On this question, the court of appeals invoked an "admittedly expansive" 1969 standard that "property" should be construed broadly to include any rights considered a "source or element" of wealth, and that rights to free speech and union democracy fall under that standard. This decision comes in conflict with holdings of this Court and other lower courts interpreting "property" more narrowly under federal law and the Hobbs Act strictly. The decision below also implicates the court of appeals' compliance with the holding in *Scheidler* that property must be obtained — as opposed to regulated, frustrated or coerced – given that here the defendants did not and could not meaningfully exercise union rights even if they did seek to coerce them.

The second issue is whether Hobbs Act extortion is shown by unexplained but "suspicious" payments where there is no evidence of fear by the payer or even the purpose of the payments. The court of appeals' reliance on general suspicion of illegality and the failure of defendant to show legitimacy places it in conflict with numerous other circuits. Together, these holdings potentially render the Hobbs Act's extortion provision an ill-defined and sweeping prohibition capable of criminalizing a broad swath of conduct, much of it potentially innocent and not otherwise recognizable as extortion.

The third issue, whether the interstate commerce affects of money laundering can be premised on the underlying criminal activity as opposed to the laundering activity is yet another question where the court below finds itself in conflict with this Court.

I. This Court Should Resolve the Dispute Whether Union Free Speech and Democratic Rights Are Obtainable Property Under the Hobbs Act and Under This Court's Decision in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003).

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) this Court granted certiorari to address the issue of what constitutes "obtainable property" under the Hobbs Act, but, while addressing the "obtaining" issue, left the property question unresolved. This is a fitting and important case to address the property issue, as the court below, in conflict with this Court and other lower courts, adopts a consciously expansive 1969 conception of property at odds with common sense and current jurisprudence. The holding below also conflicts with this Court's holding in *Scheidler* requiring that the property in question actually be obtained – as opposed to lesser actions of regulation, frustration or coercion. Because of these conflicts and the sheer illogic of the idea of "obtaining property" in the form of union democratic rights, intervention by this Court is warranted.

A. This Court Previously Granted Certiorari On the Property Issue Without Resolving It, and Should Return to Address It Here.

This is a fitting case for this Court to return to the property issue left open in *Scheidler*.[5] The treatment of the issue by the court of appeals places it in apparent conflict with decisions of this Court as well as with other lower courts. This can be seen on several levels.

5. This Court has returned to issues on which certiorari had been previously granted but where for whatever reason the issue was not decided. *See, e.g., Wilder v. Virginia Hospital Assoc.*, 496 U.S. 498, 505 n.5 (1990); *Michigan v. Payne*, 412 U.S. 47, 48 n. 2 (1973); *Leedom v. Kyne*, 358 U.S. 184, 187 (1958); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 215 (1947).

1. The court of appeals' decision is in conflict with *Scheidler* in the very basic sense that it regards this Court as having endorsed the court of appeals' 1969 decision in *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969). In *Scheidler*, although this Court granted certiorari as to both the "property" and "obtaining" prongs of the definition of extortion under the Hobbs Act, in its decision the Court did not decide the property issue. The Court explicitly deemed it "mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)." *Scheidler*, 537 U.S. at 402 n.6. Nonetheless, the court of appeals divined some sort of approval of *Tropiano* and declared that this Court had "indicated that *Tropiano* remains good law notwithstanding *Scheidler II*." App. 55a. Indeed, the court of appeals went so far as to state its "belie[f] that the appropriate interpretation of *Scheidler II* must be one that co-exists with *Tropiano both as to the 'property' and 'obtaining' prongs*." App. 52a (emphasis added). The court of appeals, in other words, elevated its 1969 decision in *Tropiano* to the determinant of, not only the property issue to which it addresses (albeit without any subsequent approval from *Scheidler*), but also of the "obtaining" issue which it does not discuss. This alone warrants the Court's attention.

2. Moreover, *Tropiano*, the adopted authority of the court below, conflicts with holdings of this Court and other courts of appeal. Simply from an interpretive perspective, *Tropiano* and its progeny are premised on liberal interpretation of the Hobbs Act that directly conflicts with *Scheidler*'s application of strict construction to the Act. Freely characterizing it as "expansive," the court of appeals adopted *Tropiano*'s statement that

> [t]he concept of property under the Hobbs Act . . . is not limited to physical or tangible property or things but includes, in a broad sense, any valuable

> right considered as a 'source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property.

App. 47a (*quoting Tropiano*, 418 F.2d at 1076). *Tropiano*, justifies this expansive definition by citation to *Stirone v. United States*, 361 U.S. 212 (1960) for the proposition that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Tropiano*, 418 F.2d at 1075 (*quoting Stirone*, 361 U.S. at 215).

The problem is that this concept of liberal construction of the Hobbs Act reflected in the court of appeal's adoption of *Tropiano* was decisively rejected in *Scheidler*'s holding that *strict* construction in the form of the rule of lenity is mandated in construing the Hobbs Act. This Court explained in *Scheidler* that the statement in *Stirone* refers to using all of Congress' power under the commerce clause, not that liberal construction of the Hobbs Act was mandated or even appropriate. *See* 537 U.S. at 408. Thus, the invocation of *Tropiano*'s "broad" and "expansive" conception of property collides inexorably with *Scheidler*.

3. *Tropiano*'s conception of property also conflicts with this Court's holding in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). In *Tropiano*, which concerned alleged extortion of the right to pursue business in a particular geographical area, the Second Circuit premised its expansive concept of property on the idea that "[t]he right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution." 418 F.2d at 1076. Whatever validity this

conclusion had in 1969, it is in conflict with this Court's authority now. In *College Savings Bank*, this Court held: "The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment. But business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense . . ." 527 U.S. at 675.[6]

4. Even if, as *Scheidler* declines to answer, the "outer boundaries of extortion liability under the Hobbs Act" may include "something as intangible as another's right to exercise exclusive control over the use of a party's business assests," 537 U.S. at 400, any conclusion that so-called rights to union democracy and free speech make safe passage into this outer boundary of "property" falls into further conflict with other lower courts. Among the cases that subscribe to the idea that union free speech and democratic rights are "property," the closest thing to any coherent rationale is that union members' rights to free speech, democratic participation and loyal and responsible representation "have direct economic value because the advancement of the members' economic interests through collective action is the raison d'etre of unions." *United States v. Bellomo*, 954 F. Supp. 630, 643 (S.D.N.Y. 1997).[7]

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6. *Scheidler* refers to property under the Hobbs Act as "business assets." 537 U.S. at 405.

7. In determining that "union democratic rights" constitute property under the Hobbs Act the court below simply followed a prior decision, otherwise barren of any analysis, that "the right of the members of a union to democratic participation in a union election is property." App. 47a-48a (*quoting United States v. Bellomo*, 176 F.3d 580, 592-93 (2d Cir. 1999)). Other courts deeming union democratic rights to constitute property under the Hobbs Act include *United States v. Debs*, 949 F.2d 199, 202 (6th Cir. 1992) ; *United States v. Local 560*, 780 F.2d

(Cont'd)

But as the *College Savings* case discussed above indicates, impact on economic well being does not render any particular right into property. Any number of legal rights can affect the bottom line of a business but even "the activity of doing business" much less the activity of advancing union interests would not be considered property under that case. 527 U.S. at 675. Or as the dissenting court in the line of cases finding union democratic rights to be property put it, "how can [a] union member's rights be exercised, transferred or sold?" *United States v. Bellomo*, 263 F. Supp. 2d 561, 575-76 (E.D.N.Y. 2003).

The cases suggesting that union democratic rights constitute property under the Hobbs Act are also in conflict with the cases holding that those same rights do *not* constitute property under the mail and wire fraud statutes. In *McNally v. United States*, 483 U.S. 350 (1987), this Court held that the mail and wire fraud statutes were limited to the schemes directed at defrauding property, and that schemes to defraud a victim of the intangible right to honest or loyal services did not fall under the statute. Following that decision, a number of lower courts held that schemes to defraud the very types of interests at issue here, such as union democracy and loyalty, do not fall under the fraud statutes because they were not directed at property. *See, e.g.*, *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989)(en banc); *United States v. Zauber*, 857 F.2d 137, 143-44 (3d Cir. 1988)(scheme to deprive union pension fund of honest services

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267, 281-82 (3d Cir. 1986); *United States v. Muscarella*, 2004 WL 2186561 (S.D.N.Y. 2004); *United States v. Local 1804-1*, 812 F. Supp. 303, 1338 (S.D.N.Y. 1993), *aff'd*, 52 F.3d 1173 (2d Cir. 1995); *United States v. Dist. Council of New York City and Vicinity of the United Bhd. of Carpenters and Joiners of Am.*, 778 F. Supp. 738, 755-56 (S.D.N.Y. 1991); *United States v. Int'l Bhd. of Teamsters*, 765 F. Supp. 1206, 1210 (S.D.N.Y. 1991).

of employees); *United States v. Lombardo*, 865 F.2d 155, 158-59 (7th Cir. 1989)(theory of defrauding union pension fund of faithful services of union officials invalid). Attempts to reconcile these conflicting lines of authority and to explain how union democratic rights constitute property under the Hobbs Act but not under the mail and wire fraud statutes are not persuasive. *See United States v. Debs*, 949 F.2d 199 (6th Cir. 1992)(focusing on *McNally*'s federalism rationale in not wanting to set standards for state and local governments and distinguishing unions as "more like one-party government"). This conflict among the lower federal courts in interpretation of the term "property" in federal criminal statutes is worthy of this Court's intervention.

Finally, the idea that rights to union democracy and free speech in particular constitute property lacks any logic. Simply at face value, such rights, whatever indirect connection they have to earning income, fall far more naturally into the category of legal rights or liberty interests rather than "business assets" or property. By way of illustration of the vague line created by the court below, in another case, the U.S. Attorney's Office for the Eastern District of New York, the same office that prosecuted this case, while insisting that "democratic rights" are property, actually conceded that the "free speech" rights of union members would not constitute property under the Hobbs Act. *United States v. Bellomo*, 263 F. Supp. 2d 561, 575 (E.D.N.Y. 2003).[8] This concession (never offered in this case) simply underscores the vicissitudes in trying to draw a precise line in and among union rights. This Court should intervene to consider a more straightforward analysis.

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8. Denominating a right to free speech "property" seems particularly dubious. Beyond that, one would think that courts should hesitate to lump that precious right into a category – property – that presumably would make it more subject to regulation.

B. The Decision Below Conflicts With Scheidler's Holding that Mere Coercion or Regulation of Property Does Not Constitute an Obtaining of that Property.

Further ground for granting certiorari lies in the failure of the court below to adhere to the decision of this Court in *Scheidler* concerning the obtaining issue which it did address.

1. The decision below loses sight of the singularly-significant overturning in *Scheidler* of the Second Circuit's decision in *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999). *Arena*, unlike *Tropiano*, after all, is about the obtaining issue decided in *Scheidler*. But in *Arena*, the court below adopted the same "admittedly expansive" view of the Hobbs Act, holding that with respect to obtaining of property, it is enough to "frustrate" the exercise of those property rights or "regulate the fate" of property. As the *Arena* court continued, "where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act." *Id.* at 394.

In no uncertain terms, this Court rejected this formulation in *Scheidler*, 537 U.S. at 403 n.8. Indeed, this Court continued and explained that compromises over the meaning of obtaining would "eliminate the recognized distinction between extortion and the separate crime of coercion . . . [which] involves the use of force or threat of force to restrict another's freedom of action." *Id.* at 406. The Court explained that the Hobbs Act would not cover instances of mere coercion such as the "prosecution of individuals who . . . employed threats and acts of force and violence to dictate and restrict the actions and decisions of

businesses." *Id.* at 405-06. This Court reasoned that to permit a Hobbs Act extortion charge to rest only upon a showing of interference with another's rights would

> eliminate the recognized distinction between extortion and the separate crime of coercion . . . [T]he crime of coercion, which more accurately describes the nature of petitioners' actions, involves the use of force or threat of force to restrict another's freedom of action.

Id. at 406. The Court cited examples of cases under the New York coercion statute, such as coercion of a business to join a trade association, or to compel a manufacturer to enter into an agreement with a labor union, or to compel union members to drop lawsuits regarding union finances. The Court found it significant that in enacting the Hobbs Act and modeling it on New York law, Congress chose to prohibit extortion, but *not* to prohibit coercion. *Id.* at 405-06.

The court of appeals fails to explain how the government's theory in this case differs materially from the coercion and *Arena* formulations rejected in *Scheidler*. The alleged efforts to coerce union delegates or officials to vote for certain officers, or to award a contract to a particular bidder or to make a particular personnel decision do not materially differ from the concept of inducing abandonment of a right as formulated in *Arena* and rejected by *Scheidler*. Nor do they differ materially from the coercion cases concept of "dictat[ing] and restrict[ing] the actions and decisions of businesses" also rejected in *Scheidler* as a viable test. Defendants here were not accused of actually obtaining union votes and casting them, or actually voting to award a contract. And the theory presented to the jury that they obtained "free speech" remains nonsensical to this day.

Similarly, the court of appeals fails to explain how the defendants here, with respect to union democratic rights, "pursued []or received something of value from respondents that they could *exercise, transfer, or sell.*" App. 53a (adding emphasis). It is difficult to understand how defendants, on any rational meaning of the words, could "exercise, transfer, or sell" the rights in question any more than the abortion protesters could exercise the rights of the clinics. While the court of appeals asserts that the distinction here is that defendants "caused the relinquishment" of the union rights in the self-interest of the defendants, *id.* at 54a-55a, clearly such self-interest is at the heart of the rejected theories in *Scheidler* as well. This is especially so with the coercion examples given by the Supreme Court that do not involve extortion. In those instances, coercion of a business to join a trade association, or to compel a manufacturer to enter into an agreement with a labor union, or to compel union members to drop lawsuits regarding union finances had the very components at play here, yet were given as examples of *coercion* not extortion by this Court. *Id.* at 405-06.

For these reasons as well, this Court should issue the writ of certiorari on the Hobbs Act issue of whether obtainable property was at issue in this case.

II. The Conclusion of the Court of Appeals that Hobbs Act Extortion Can Be Founded On Unexplained, "Suspicious" Payments Dangerously Expands the Offense and Shifts the Burden of Proof.

The decision of the Second Circuit also conflicts with other courts of appeal and dangerously broadens Hobbs Act extortion liability by allowing an extortion conviction to be premised on unexplained, "suspicious" payments without any evidence of the purpose of the payments or even that the payer was fearful. The court's holding is premised on lines of reasoning concerning

evidentiary sufficiency that other courts of appeal squarely reject — speculation that "something" illegal was happening and shifting the burden to defendant to proffer a "legitimate" explanation. In tandem with the interpretation of "obtaining property," the Second Circuit's holding potentially renders the Hobbs Act a dangerous and expansive statute applicable to innumerable "property" interests based on speculative proof.

A. Background

As the court of appeals described, the "gravamen of these counts was that certain defendants, including defendant-appellant Ciccone, had extorted cash payments over a period of time from Carmine Ragucci, the then-owner of a shipping terminal in Staten Island." App. 16a. The salient facts are simply that Ciccone received payments through intermediaries from Ragucci, but there is no evidence in the record what the payments were for. Ragucci never testified, and "Red" Scollo, the main intermediary and only witness with knowledge testified that he did not know the purpose of the payments (Tr. 1663, 1391). Scollo could only offer that the payments were made in a surreptitious manner and his subjective opinion that the payments must have been illegal. Scollo added that Ciccone would be "a little pissed off" when the payments were late, and that Scollo would convey that to Ragucci. No evidence whatsoever was elicited that Ragucci was in fear, or why he made the payments at all. App. 16a-18a.

The court of appeals concluded that "a reasonable jury could have concluded that Ciccone obtained these cash payments from Carmine Ragucci by exploiting Ragucci's fear of Ciccone, particularly given Scollo's testimony that Ciccone would be 'pissed off' when the payments were late, and that Scollo would then communicate that displeasure to Ragucci." App. 75a. The court of appeals emphasized illegality or illegitimacy in the abstract as the basis of proof of extortion, underscoring that

witnesses "did not know of any legitimate basis for these payments" or that Scollo "knew his involvement in it was 'not the proper thing to do.'" *Id.* Even though nobody, Ragucci included, testified about the purpose of the payments, the court of appeals drew the negative inference that there was "no affirmative evidence whatsoever that these payments were for a legitimate purpose, such as repayment of a loan or payment for services rendered." *Id.*

B. The Decision Conflicts With Decisions of Several Circuits

The decision of the court of appeals conflicts with several other circuits that forbid speculation that "something" illegal transpired and criticism that defendant did not prove a legitimate explanation as substitutes for proof of the charged offense beyond a reasonable doubt. The net effect is an overbroad construction of the Hobbs Act, rendering it an unexplained property transfer statute not requiring any proof of fear by the payer or even the purpose of the payment.

The prosecution was obligated to show beyond a reasonable doubt that defendant "obtain[ed] . . . property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right" 18 U.S.C. § 1951(b)(2).[9] On appellate review, to be sure, a defendant bears a heavy burden and "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). At the same time,

9. The court below has applied the standard whereby "defendant must knowingly and willfully create or instill fear, or use or exploit existing fear with the specific purpose of inducing another to part with his or her property." *United States v. Abelis*, 146 F.3d 73, 83 (2d Cir. 1998).

"[i]t would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty. . . ." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (emphasis in original). Appellate courts agree that "a conviction based on speculation and surmise alone cannot stand." *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994); *see, e.g., United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997)(jury's inferences must be "more than speculation and conjecture in order to be reasonable"); *United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994)("reasonable inferences, and not mere speculation, must support the jury's verdict").

In this case the court of appeals applied these principles in a manner conflicting with decisions of other courts of appeal. Indisputably without any evidence to cite of any fear by the payer or reason for the payments, the court of appeals emphasized illegality or illegitimacy in the abstract as the basis of proof, underscoring that witnesses "did not know of any legitimate basis for these payments" or that one witness "knew his involvement in it was 'not the proper thing to do.'" App. 75a. Multiple courts of appeal have held, however, that the inference that "something illegal" happened is no substitute for otherwise wanting proof beyond a reasonable doubt. The District of Columbia Circuit, for example, has held that "evidence that implies . . . general knowledge of criminality afoot is insufficient to sustain a conviction for aiding and abetting a specific crime" *United States v. Teffera*, 985 F.2d 1082, 1086-87 (D.C. Cir. 1993). The Fifth Circuit has held, "It is not enough for [the government] merely to establish a climate of activity that reeks of something foul." *United States v. Wieschenberg*, 604 F.2d 326, 331-32 (5th Cir. 1979). Other courts subscribe to this fundamental principle. *See United States v. Rahsperian*, 231 F.3d 1257, 1262-63 (10th Cir. 2000)(rejecting argument that defendant's conduct was "incriminating in some way"); *United States v. Dean*, 59 F.3d 1479, 1487 (5th Cir. 1995) ("[E]vidence

sufficient to support a reasonable inference that a defendant was knowingly acting as a lookout was insufficient support for the further inference that the defendant knew what he was protecting."); *United States v. Pena*, 983 F.2d 71, 72-73 (6th Cir. 1993) (automobile passenger's direct admission that she "felt" something illegal was occurring around her was not sufficient to show that she knew of cocaine hidden in the vehicle); *United States v. Wexler*, 838 F.2d 88, 91-92 (3d Cir. 1988) (despite evidence that the defendant acted as a lookout, "the absence of evidence linking defendant to the specific object of the conspiracy proved fatal" to the government's case when "[t]he evidence is just as consistent, for example, with a conspiracy to transport stolen goods, an entirely different crime").[10]

The court of appeals also drew itself into a conflict at the very least with the 11th Circuit and seemingly long-settled fundamental due process principles when it faulted defendant for not pointing to evidence of any legitimate reason for the

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10. Before this case, the Second Circuit had subscribed to this principle. *United States v. Wiley*, 846 F.2d 150,155 (2d Cir. 1988) ("a general suspicion or knowledge [of illegality is] . . . not enough")(*quoting United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985)). *See United States v. Santos*, 449 F.3d 93, 103 (2d Cir. 2006 (as amended))("Even though a conviction can rely on circumstantial evidence, "suspicious circumstances" are not enough to sustain a conviction.") *United States v. Cruz*, 363 F.3d 187, 198-99 (2d Cir. 2004)(defendant "likely knew that some type of crime was being committed . . . [but] there is little evidence in the record which suggests that Cruz knew of the specific crime Medina proposed to commit or that Cruz intended to facilitate such a crime."); *United States v. Nusraty*, 867 F.2d 759, 765, 766-67 (2d Cir. 1989) (false exculpatory statements may be probative of defendant's knowledge that he was "caught up in a situation involving criminal activity," but they were not sufficient to show that defendant knew of the specific conspiracy charged by the government).

payments in question. The court drew on the conclusion that there was "no affirmative evidence whatsoever that these payments were for a legitimate purpose, such as repayment of a loan or payment for services rendered," later underscoring that "no evidence supporting such [alternative] reasons [for the payments] was presented to the jury." App. 75a. This posits a line of reasoning that the jury itself was forbidden to entertain – that the defendant failed to shoulder a burden of establishing his innocence. The Eleventh Circuit addressed and rejected precisely this argument in *United States v. Fernandez*, 892 F.2d 976, 986 n.9 (11th Cir. 1990):

> The dissent would shift the burden of proof to appellants to show that the meeting at Miguel's home concerned a lawful purpose. Appellants did not bear any such burden. Lawfulness of purpose is not an affirmative defense to conspiracy; rather, unlawfulness of purpose is an element of the crime. As the government failed to offer any evidence that an illegal agreement transpired at Miguel's home, appellants had no inference to rebut, and the government's remaining evidence had no inference to confirm.[11]

Defendant surely had the right to contest the government's failure to prove extortion of Carmine Ragucci and it seemingly violated that right to hold against him on appeal his failure to show any "legitimate" reason for the payments.

The court's remaining reason for upholding the verdict was the testimony by the intermediary Scollo that Ciccone was

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11. As this Court explained in *Patterson v. New York*, 432 U.S. 197, 215 (1977), the "State must prove every ingredient of an offense beyond a reasonable doubt, and . . . it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."

"pissed off" when payments were late. Without any evidence of the purpose of the payments, this merely underscores the dangerous breadth of the lower court's opinion. In our bustling commercial society, being "pissed off" at non-payment is too common a reaction, too vague, and too embracing of innocent behavior to constitute the defining characteristic of criminality. *Williams v. United States*, 458 U.S. 279, 290 (1982)(construing statute narrowly in part to avoid construction that "would render a wide range of conduct violative of federal law").

In the third installment of the *Scheidler* litigation, this Court held that the Hobbs Act is limited to extortion and robbery and declined to expand its application to acts of violence in general. *Scheidler v. National Organization for Women, Inc.*, 126 S. Ct. 1264 (2006). By the same token, the Court should take note of any transmogrification of the Hobbs Act into a federal, unexplained and suspicious property transfer statute. Such an overbroad construction of the Hobbs Act – to the effect that unexplained, late payments must indicate extortion — would transgress the obligations of sensible and strict construction of criminal statutes. *Scheidler*, 537 U.S. 408-09. With the court of appeals already advocating an amorphous definition of property, this Court should intervene.

III. The Court of Appeals Applied a Standard Rejected By this Court to the Interstate Commerce Element of the Money Laundering Counts.

In rejecting a challenge to the money laundering counts on the basis that the affect on interstate commerce was not proven, the court of appeals applied a standard that has been rejected by this Court. The Court relied upon *United States v. Goodwin*, 141 F.3d 394, 402 (2d Cir. 1997) and *United States v. Leslie*, 103 F.3d 1093, 1101-02 (2d Cir. 1997) for the proposition "that it is indeed permissible to consider the conduct that gave rise to the laundered funds" in evaluating whether the interstate

commerce requirement was met. App. 81a-82a. However, this Court in *United States v. Cabrales*, 524 U.S. 1, 7 (1998), concerning venue, held that the situs of the actual laundering activity and not the underlying criminal activity is the relevant consideration, reasoning that the money laundering statutes "interdict only the financial transactions . . . not the anterior criminal conduct that yielded the funds allegedly laundered." In contrast to the Second Circuit, other circuits recognize and emphasize that the underlying offense is separate from the money laundering offense. *See, e.g., United States v.* [redacted] 238 F.3d 530, 534-35 (4th Cir. 2001)(reversing [redacted] premised on underlying criminal activity and recognizing [redacted] circuit authority no longer valid after Cabrales); *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. 1998); *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994)(in respect to sentencing). Accordingly, the underlying activity itself should not be utilized to establish the interstate commerce element. The court of appeals' failure to apply the central principle of Cabrales to the interstate commerce issue, in contradistinction of the holdings of other courts of appeal warrants this Court's intervention.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 12, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 04-2746-CR(L) 04-2960-CR(XAP), 04-4217-CR(CON) 04-4842-CR(CON), 04-5071-CR(CON), 06-0726-CR(CON).

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

v.

PETER GOTTI,

Defendant-Appellant-Cross-Appellee,

ANTHONY CICCONE, also known as SONNY, RICHARD BONDI, RICHARD G. GOTTI,

Defendants-Appellants,

PRIMO CASSARINO, JEROME BRANCATO, PETER PIACENTI, ANNA EYLENKRIG, THOMAS LISI, CARMINE MALARA, JEROME ORSINO, FRANK SCOLLO, VINCENT NASSO, ANTHONY PANSINI, JULES R. NASSO, SALVATORE CANNATA,

Defendants.

Argued: April 7, 2006
Decided: July 12, 2006

Appendix A

Before FEINBERG and KATZMANN, Circuit Judges, and LYNCH, District Judge.*

KATZMANN, *Circuit Judge.*

This case raises an issue of first impression for this Court: the scope of the Supreme Court's holding in *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003) ("*Scheidler II*"),[1] in which the Supreme Court tightened the requirements for finding that a defendant has committed extortion under the Hobbs Act, 18 U.S.C. § 1951. On appeal, the defendants-appellants—Peter Gotti, Richard G. Gotti, Anthony ("Sonny") Ciccone, and Richard Bondi—argue that *Scheidler II* invalidates all of the Hobbs Act counts in this case that were premised on the extortion of intangible property rights. We hold, however, that *Scheidler II* did not invalidate the challenged extortion counts at issue in this case, because *Scheidler II*—far from holding that a Hobbs Act extortion could not be premised on the extortion of intangible property rights—simply clarified that for Hobbs Act liability to attach, there must be a showing

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* The Honorable Gerard E. Lynch, United States District Judge for the Southern District of New York, sitting by designation.

1. This decision is frequently abbreviated as "*Scheidler II*," because it represented the case's second journey up to the Supreme Court. The case's first visit to the Supreme Court—*National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994)—is generally referred to as "*Scheidler I.*" A recent ruling by the Supreme Court on yet another issue in the case, *Scheidler v. Nat'l Org. for Women, Inc.*, __ U.S. __, 126 S.Ct. 1264, 164 L.Ed.2d 10 (Feb. 28, 2006), is known as "*Scheidler III.*" For purposes of clarity, we employ these abbreviations in this opinion.

that the defendant did not merely seek to deprive the victim of the property right in question, but also sought to obtain that right for himself. That standard, which can be satisfied regardless of whether the property right at issue is tangible or intangible, has been met by each of the Hobbs Act counts at issue here. We also reject the numerous other challenges brought by the defendants-appellants to their convictions. Finally, with regard to the defendants-appellants' sentences, we remand Ciccone's and Bondi's cases for resentencing pursuant to *United States v. Fagans*, 406 F.3d 138 (2d Cir.2005), and we remand Peter Gotti's case for consideration of resentencing pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir.2005).[2] We also reject the argument advanced in the government's cross-appeal that the district court erred when, in sentencing Peter Gotti under the then-mandatory Sentencing Guidelines, it declined to impose a four-level leadership role enhancement upon him despite its finding that he had served as acting boss of the Gambino Organized Crime Family of La Cosa Nostra (the "Gambino Family").

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2. Richard G. Gotti's appeal was previously severed from this appeal, and his case was remanded to the district court for consideration of resentencing pursuant to *Crosby*. The district court declined to resentence, and Richard G. Gotti then moved to reconsolidate his appeal with the instant appeal so that he could join in the arguments of the other defendants-appellants to the extent that they benefitted him. Accordingly, we assume that Richard G. Gotti joins in those of the defendants-appellants' challenges to their convictions that are applicable to his own convictions. Given that we ultimately reject all of those challenges for the reasons set forth *infra*, and that the district court has already considered whether to resentence him pursuant to *Crosby*, there is no need for a further remand of Richard G. Gotti's case.

Appendix A

I. BACKGROUND: THE INDICTMENT, TRIAL, VERDICTS, AND SENTENCES

A. The Indictment

The 68-count indictment in this case centered on the corrupt influence of the Gambino Family over certain labor unions, businesses, and individuals operating at the piers in Brooklyn and Staten Island. The indictment was brought against seventeen Gambino Family members and associates, including the four defendants-appellants here: (1) Peter Gotti, described in the indictment as the acting boss of the Gambino Family; (2) Ciccone, described as a Gambino Family captain; (3) Richard G. Gotti, described as a "made member" of the Gambino Family; and (4) Bondi, described as a Gambino Family associate.[3] The four defendants-appellants all went to trial, along with three other defendants (Primo Cassarino, Richard V. Gotti, and Jerome Brancato, all of whom were described as "made members" of the Gambino Family), while the remaining ten defendants entered guilty pleas.[4]

The first two counts of the indictment were racketeering and racketeering conspiracy counts brought under 18 U.S.C. §§ 1962(c) and (d). These two counts encompassed, as predicate acts, the substantive allegations that were then also set forth as separate offenses in Counts 3-68.

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3. For a brief discussion of the meaning of those terms, *see infra* page 309.

4. Those ten defendants, certain of whom figure in the factual recitation below, were Peter Piacenti, Anna Eylenkrig, Thomas Lisi, Carmine Malara, Jerome Orsino, Jr., Frank Scollo, Vincent Nasso, Anthony Pansini, Julius R. ("Jules") Nasso, and Salvatore Cannata.

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For purposes of this appeal, the counts of which the defendants-appellants were ultimately convicted can be divided, on the basis of general subject matter, into fourteen categories. Those categories are as follows: (1) the International Longshoremen's Association, AFL-CIO ("ILA") Counts (RICO Predicate Act 1; Counts 3-7); (2) the Management-International Longshoremen's Association Managed Health Care Trust Fund ("MILA") Counts (RICO Predicate Act 2; Counts 8-13); (3) the Local 1 Checkers chapter of the ILA ("Local 1") Counts (RICO Predicate Act 3; Counts 14-18); (4) the Local 1814 chapter of the ILA ("Local 1814") Counts (RICO Predicate Act 4; Counts 19-23); (5) the Howland Hook Container Terminal ("Howland Hook") Counts (RICO Predicate Act 5; Counts 24-25); (6) the Frank Molfetta ("Molfetta") Counts (RICO Predicate Act 6; Counts 26-27); (7) the Money Laundering Counts (RICO Predicate Acts 7-21; Counts 28-46); (8) the Tommy Ragucci ("Ragucci") Counts (RICO Predicate Act 23; Counts 49-50); (9) the Leonardo Zinna ("Zinna") Count (RICO Predicate Act 24; Count 51); (10) the Nicola Marinelli ("Marinelli") Counts (RICO Predicate Act 25; Counts 52-53); (11) the Eduard Alayev ("Alayev") Counts (RICO Predicate Act 26; Counts 54-57); (12) the Steven Seagal ("Seagal") Counts (RICO Predicate Act 27; Counts 58-59); (13) the Gambling Counts (RICO Predicate Acts 31-32; Counts 66-67) and (14) the Witness Tampering Count (RICO Predicate Act 33; Count 68).

Appendix A

B. The Trial

Below, we summarize—in the light most favorable to the government, given the defendants-appellants' convictions—the evidence adduced at trial as to each category of counts with respect to the applicable defendants-appellants.

1. The ILA Counts

The gravamen of the ILA Counts, Indictment ¶¶ 98-109, was that certain members and associates of the Gambino Family, including defendant-appellant Ciccone, had exercised control over the affairs of the union, first by using force to determine "who filled various International Executive Officer and other ILA positions" in order to "ensure that organized crime associates would be placed in these positions," and then by directing the activities of those office-holders. *Id.* ¶ 100. These activities gave rise to counts of both extortion and fraud.

With regard to extortion, the indictment alleged that the defendants had wrongfully obtained the following property of ILA union members: "(1) ILA labor union positions, money paid as wages and employee benefits, and other economic benefits that such ILA union members would have obtained but for the defendants' corrupt influence over such union; (2) the right of ILA union members to free speech and democratic participation in the affairs of their labor organization as guaranteed by [Sections 411 and 481 of the Labor-Management Reporting Disclosure Act ('LMRDA'), 29 U.S.C. § 401 *et seq.*]; and (3) the right of ILA union

members to have the officers, agents, delegates, employees and other representatives of their labor organization manage the money, property and financial affairs of the organization in accordance with [Section 501(a) of the LMRDA]." *Id.* ¶ 99.

As to fraud, the indictment stated that the defendants had defrauded the ILA and its members out of (1) "ILA labor union positions, money paid as wages and employee benefits, and other economic benefits that such ILA union members would have obtained but for the defendants' corrupt influence over such union" and (2) their right to the honest services of their elected officials and other ILA delegates, employees, agents, and representatives. *Id.* ¶ 104.

At trial, the government adduced substantial evidence in support of the ILA charges. George Barone—a member of the Genovese Organized Crime Family of La Cosa Nostra (the "Genovese Family")—testified that there had been a long-held understanding between the Gambino Family and the Genovese Family concerning the ILA's activities, whereby the Gambino Family "would take care of Staten Island and Brooklyn" and the Genovese Family "would take care of New York and New Jersey." Trial Tr. ("Tr.") 721-22, 727. Barone stated that in the late 1970s, Ciccone became the Gambino representative in charge of the waterfront for Staten Island and Brooklyn, and served as a vice president of the ILA, with the local ILA union officials essentially under his control. Tr. 735-37. Barone himself went to jail from 1983 to 1990, and after being released from jail, again became involved in the Genovese Family's waterfront activities. Tr. 739, 743. At that point, Barone learned that Ciccone was

still controlling the waterfront activities in the area, and still possessed influence over the ILA local union officials' activities. Tr. 755.

Additionally, Frank Scollo—former president of Local 1814, an ILA chapter in Brooklyn—testified that "Mr. Ciccone would tell me on many occasions what to do, what not to do." Tr. 1337, 1341-42. Scollo explained that he feared losing his job as president if he contradicted Ciccone's orders. Tr. 1371. He stated his predecessor, Frank Lonardo, had similarly taken instructions from Ciccone. Tr. 1362-63. Scollo further testified that he kept his relationship with Ciccone secret from all of the other union members. Tr. 1411.

Scollo also specifically testified that prior to the July 2000 ILA convention in Lake Tahoe (which Scollo was to attend as a delegate), Ciccone gave him instructions as to which individuals should be elected to various ILA leadership positions. Tr. 1396. Scollo stated that he was only partially able to carry out these instructions, and that he immediately conveyed all of the developments to Ciccone because "Sonny wanted to know whatever we did; he wanted to be firsthand; he wanted to know about it." Tr. 1398-1400. Scollo explained that Ciccone "didn't want to lose any positions from the Brooklyn side, and as a result, we lost one spot that was [a] concern of his and ours." Tr. 1401. The government also introduced wiretap evidence of the reports that Scollo made to Ciccone (through Cassarino as an intermediary). Gov't Exh. TR-63.

Moreover, Scollo testified that after the ILA convention, a particular Local 1814 delegate named Phil Scala was upset

that he had not obtained the leadership position that he wanted, and thus essentially refused to do any more work. Tr. 1448. Scollo, as a result, was very unhappy with Scala's performance and wanted to terminate him. Tr. 1449. However, Scollo did not feel that he had the authority to terminate Scala without Ciccone's approval, because "Sonny always told us . . . it's the big decisions that we should have to confer with him first." Tr. 1450. In a wiretapped April 18, 2001 conversation between Scollo and Ciccone, Scollo asked, "Can I fire him if I have to?" Gov't Exh. TR-87. Ciccone responded, "Know what you do . . . don't pay him for vacation, and tell him, 'Let me tell you something, I was told to tell you already that next time you fuck up like this and you leave me hanging like this, I'm gonna fire you'. . . . And let him go where the fuck he wants to go." *Id.* Scollo followed these instructions and Scala later resigned. Tr. 1455. Scollo then sought Ciccone's approval to appoint someone else in his place. Tr. 1456.

2. The MILA Counts

The MILA Counts related to a scheme of the Gambino and Genovese Families to use their control over MILA (the ILA's national health plan) to ensure that a particular company called GPP/VIP—which was partially owned by Gambino Family associate Vincent Nasso, and which paid substantial kickbacks—was awarded MILA's lucrative pharmaceutical services contract. Indictment ¶¶ 110-113. Ciccone was the only defendant-appellant named in these counts.

At trial, the government adduced evidence of the MILA scheme from several sources. David Tolan—the management

co-chairman of MILA since 1997—testified that MILA had been established in early 1997 as a national health plan for all ILA members, and that its Board of Trustees included eighteen management-side trustees and eighteen union-side trustees. Tr. 1079, 1082. In 1997, the MILA trustees decided to include a prescription drug benefit for the members and, to that end, requested proposals from twenty-two pharmaceutical benefit providers. Tr. 1088. All twenty-two companies responded with bids; MILA's outside consultants then produced a list of the top five contenders. Tr. 1088-89. A company called GPP ranked number five in that list, while a company called Express Scripts ranked first. Tr. 1089. Nolan recommended that GPP (which he believed lacked sufficient financial resources) be eliminated from the list, and that MILA engage Express Scripts. Tr. 1092. The union trustees, however, did not agree with that recommendation, and wanted to enter into an arrangement with GPP. Tr. 1093, 1097-98. The trustees eventually reached an agreement whereby everything below the Virginia border would be managed by Express Scripts, and everything above the Virginia border would be managed by GPP, which had since become part of a larger entity called GPP/VIP. Tr. 1099-1101. The principals of GPP/VIP were Joel Grodman and co-defendant Vincent Nasso. Tr. 1101.

Tolan further testified that after Express Scripts refused to allow an audit that the MILA trustees wanted, MILA began using GPP/VIP exclusively, both north and south of the Virginia border. Tr. 1104-05. Tolan stated that he did not consider GPP/VIP cost-effective, because it was more expensive than other service providers. Tr. 1108. In June of 2001, GPP/VIP requested a half-million dollar annual fee

increase, at which point Tolan decided to have the MILA consultants initiate a new round of bidding for the contract. Tr. 1110-13. After the bids came in, GPP/VIP came in second place; in first place was Advance PCS, a pharmaceutical benefit provider whose bid was $4.5 million cheaper than that submitted by GPP/VIP. Tr. 1113-14. Although all the trustees then initially agreed to award the contract to Advance PCS, the union trustees subsequently changed their position and sought to impose two conditions on Advance PCS. Tr. 1114, 1120. Advance PCS agreed to the conditions, but the union trustees still refused to support it, and brought a motion to continue using GPP/VIP. Tr. 1123-25. At that point, the management trustees submitted the matter to binding arbitration, and the arbitrator ultimately ruled in favor of Advance PCS. Tr. 1126-27. Thus, GPP/VIP ultimately held the lucrative pharmaceutical services contract from approximately 1997 to 2001.

The government also adduced evidence that helped to explain why certain ILA trustees had been such strong supporters of GPP/VIP, notwithstanding its higher rates: Ciccone had so ordered. Barone testified that Vincent Nasso was a Gambino Family associate who paid kickbacks to Ciccone out of the contract proceeds. Tr. 760-61. Moreover, Scollo—who, after becoming the President of Local 1814 in August of 2000, became a union-side MILA trustee—specifically testified that he was informed that "Sonny [Ciccone] was interested in [Vincent] Nasso, keeping the GPP in place." Tr. 1412-13. He stated that "Sonny himself told me to keep him abreast of it." Tr. 1413. Scollo further testified that when Advance PCS emerged as a strong challenger in 2001, Cassarino instructed Ciccone, "make sure you do all

you can to help [GPP]." Tr. 1419. Scollo responded, "I'll do the best I can, but I think it's too far gone." Tr. 1419-20. Scollo testified that he did not reveal Ciccone's connection with Nasso to any of the other MILA trustees or members. Tr. 1431.

The government also presented wiretap evidence indicating the connection between Nasso and Ciccone, as well as the kickbacks that were being paid from Nasso to Ciccone. For example, in a March 26, 2001 wiretapped conversation among Ciccone, Cassarino, and Nasso, the three men discussed the fact that the MILA March payment had just come in. Gov't Exh. TR-176. Ciccone asked Nasso, "When am I going to see you? I gotta, I'm gonna lay it out." *Id.* (As discussed in further detail *infra*, this was apparently a reference to Ciccone's need for the money in order to make his monthly tribute payment to Peter Gotti, the acting boss.) On Wednesday, April 18, 2001, Ciccone and Nasso spoke again about the MILA contract. Nasso noted that "the Jew [Joel Grodman, co-principal of GPP/VIP] wants to raise the rate." Gov't Exh. TR-178N. Ciccone responded, "Tell him to go fuck himself. Tell him you do what I tell you to do." *Id.* Ciccone added, "I'm calling the shots over here, not you. And tell him, the day you don't like it, I got another guy to replace you. You're only here on account of me. Fuck him." *Id.* Nasso agreed, stating, "All right. That's what I'm gonna say today." *Id.* Ciccone also asked about receiving his check, to which Nasso responded, "The Jew's gotta send me the money." *Id.* Ciccone asked, "But the Jew got the money?" *Id.* Nasso replied, "No, not yet, not yet. . . . I gotta know when it comes in." *Id.* Ciccone said, "So tell me about it, I'm laying the fucking thing out too . . . [the] last two months, last two times." *Id.*

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3. The Local 1 Counts

The gravamen of the Local 1 Counts, Indictment ¶¶ 124-137, was that certain defendants, including defendants-appellants Ciccone and Bondi, had conspired and attempted to extort and defraud the Local 1 Chapter of the ILA, particularly by trying to exercise control over two Local 1 officials: Steve Knott (the president) and Louis Saccenti (an elected Local 1 delegate). Specifically, the indictment alleged that the defendants had sought to extort the Local 1 members' property interests in "(1) Local 1 labor union positions, money paid as wages and employee benefits, and other economic benefits that such Local 1 union members would have obtained but for the defendants' corrupt influence over such union; (2) the right of Local 1 union members to free speech and democratic participation in the affairs of their labor organization as guaranteed by [Sections 411 and 481 of the LMRDA, 29 U.S.C. § 401 *et seq.*]; and (3) the right of Local 1 union members to have the officers, agents, delegates, employees and other representatives of their labor organization manage the money, property and financial affairs of the organization in accordance with [Section 501(a) of the LMRDA]." *Id.* ¶ 125. The indictment further alleged that the defendants had sought to defraud Local 1 and its members out of (1) "Local 1 labor union positions, money paid as wages and employee benefits, and other economic benefits that such Local 1 union members would have obtained but for the defendants' scheme and artifice to defraud" and (2) their right to the honest services of their elected officials and other Local 1 delegates, employees, agents, and representatives. *Id.* ¶ 130.

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At trial, Scollo testified that while he was President of Local 1814, he had several conflicts with Saccenti, because Saccenti—on behalf of Local 1—would sometimes take actions that "were detrimental to the Brooklyn side of the waterfront, my local [Local 1814]." Tr. 1432. When this occurred, Scollo would "call up Primo [Cassarino] and say 'that guy's breaking chops again,' and he would bring it to Sonny [Ciccone]." *Id.* For example, on one occasion during the summer of 2000, Scollo was upset that Saccenti was going to fill a temporarily vacant shop steward position with someone named Doyle. Tr. 1433. Scollo explained that he wanted someone else to fill that position. *Id.* Accordingly, he reported the situation to Cassarino, hoping that Cassarino would tell Ciccone and that Ciccone would "reach out for Louie [Saccenti] not to make that change." Tr. 1433-44. Cassarino, in turn, told Scollo to tell "Stevie" [Knott] "not to make any move until [Ciccone] speaks to [Saccenti]." Tr. 1441. Scollo, however, was unable to reach Knott. *Id.*

Scollo testified that the friction between him and Saccenti continued, as Saccenti attempted to make certain changes at the Howland Hook Container Terminal in Staten Island. Tr. 1444-45. Scollo did not like these changes because he believed they would "slow things down" on the Local 1814 side. Tr. 1445. Thus, in a February 26, 2001 wiretapped conversation between Scollo and Cassarino, Scollo said that he had told "Augie [Decrescenzo, the Local 1 stop steward] no changes till we get notified. That's Sonny's [Ciccone's] orders." Gov. Exh. TR-77. In a March 8, 2001 conversation between Scollo and Cassarino, Scollo reported, "Augie called me. . . . [H]e was all disturbed from Howland Hook. . . . Louie [Saccenti] told Augie this afternoon that he spoke to

you and everything was taken care of." Gov't Exh. TR-78. Scollo stated that Saccenti was a "liar" for having falsely implied that everything was resolved. *Id.* Cassarino instructed, "[T]ell Louie, 'Lou, what are you doin', you're supposed to see me before you do anything.' " *Id.*

The tension between Scollo and Saccenti continued to worsen, as evidenced by a June 27, 2001 wiretapped conversation between Scollo and Cassarino, in which Scollo reported that Saccenti was telling everyone "all bets are off." Gov't Exh. TR-79. Cassarino responded, "I don't understand this guy. . . . Who the fuck is givin' this guy authority to do this?" *Id.* Scollo agreed: "Something's gotta be done with Louie." *Id.* Cassarino reiterated, "He's outta control. . . . Who the fuck's he think he is?" *Id.* Later that day, in another wiretapped conversation, Ciccone instructed Cassarino to take "Richie" [Bondi] with him that night and to "[s]top by" Saccenti's house, "ring his bell," and "[s]ay, you know what? You'd better stop it. . . . You'd better stop. . . . Otherwise, you know what's gonna happen here?" Gov't Exh. TR-81. At trial, an investigator for the New York State Attorney General's organized crime task force testified that on that evening, he saw Cassarino and Bondi drive up to Saccenti's home, exit their car, walk toward the entrance, wait there, and then drive away. Tr. 3230-3235.[5]

At trial, Scollo acknowledged that as a Local 1814 official, he did not have any authority over these Local 1 officials, but testified that he—through the help he received

5. In the transcript, the date is transcribed as January 27, 2001, rather than June 27, 2001. Tr. 3231. We assume that this is a transcription error.

from Cassarino and Ciccone—was nonetheless sometimes successful in influencing Saccenti's activities with respect to Local 1. Tr. 1447-48.

4. The Local 1814 Counts

These counts alleged that certain defendants, including Ciccone, had—principally through their control over Scollo, the Local 1814 President—conspired and schemed to defraud members of Local 1814 out of (1) "Local 1814 labor union positions, money paid as wages and employee benefits, and other economic benefits that such Local 1814 union members would have obtained but for the defendants' scheme and artifice to defraud" and (2) their right to the honest services of their elected officials and other Local 1814 delegates, employees, agents, and representatives. Indictment ¶¶ 138-151. The government adduced significant evidence in support of these charges, as described above: namely, the testimony and wiretaps illustrating in detail that Scollo, unbeknownst to the Local 1814 members whom he purportedly represented, had taken orders from Ciccone as to Local 1814 activities, and had not made significant Local 1814 decisions without first obtaining Ciccone's approval.

5. The Howland Hook Counts

The gravamen of these counts was that certain defendants, including defendant-appellant Ciccone, had extorted cash payments from Carmine Ragucci, the then-owner of Howland Hook Container Terminal, a shipping terminal in Staten Island. *Id.* ¶¶ 152-155.

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At trial, Scollo testified that in late 1996 (before he became president of Local 1814), Ciccone told him that Ragucci was going to start giving him envelopes for transmission back to Ciccone. Tr. 1379. Scollo said that he did "not really" want to be involved in bringing the envelopes from Ragucci to Ciccone. *Id.* Nonetheless, about eight or nine months later, Ragucci began periodically giving Scollo envelopes for Ciccone. Tr. 1380-81. Scollo testified that he would give the envelopes either directly to Ciccone, or (at Ciccone's instructions) to someone else who would then pass the envelope on to Ciccone. Tr. 1381-82. Scollo once assisted Ragucci in putting approximately $8,900 in cash in an envelope for transmission to Ciccone. Tr. 1383.

Scollo testified that he was supposed to pick up the envelopes from Ragucci quarterly, but that Ragucci was very often late with the payments. Tr. 1384. When Ragucci was late, Scollo would report to Ciccone that Ragucci did not have the money, at which point Ciccone would tell him to "make sure that guy does the right thing," and "make sure you go back and make sure you get it." Tr. 1384, 1392. Scollo testified that Ciccone would be "a little pissed off" by late payments and that he, in turn, would communicate Ciccone's displeasure to Ragucci. Tr. 1392.

Scollo further stated that he believed that the transmissions were illegal, explaining, "The fact that we were doing it in these crazy places, and it got worse as time went by, I knew it was not the proper thing to do. I just did it." Tr. 1386. He also testified about the surreptitious nature of the transmissions: "We tried to use decoded ways. . . . By that I mean, we would use various code words—you got 'that

thing'?" Tr. 1388. He explained that they wanted to ensure that if someone were listening to the conversation, its meaning would not be easily understood. Tr. 1389.

Additionally, both Scollo and Carmine Ragucci's brother, Tommy, indicated that Ciccone had no legitimate reason to collect payments from Ragucci, by testifying that to their knowledge, Ciccone had not loaned Ragucci money, nor was he an investor in Howland Hook. Tr. 1744-45, 1897.

6. The Molfetta Counts

These counts alleged that certain defendants, including defendant-appellant Ciccone, had extorted Frank Molfetta, the owner of a trucking company. Indictment ¶¶ 156-59. The events leading up to this extortion began in 1994, when Molfetta—the owner of a trucking company named Bridgeside Drayadge—entered into a written contract with Carmine Ragucci, pursuant to which he paid Ragucci $150,000 for certain exclusive rights to operate the trucking business at Howland Hook. Tr. 1785. Molfetta was supposed to pay Ragucci an additional $100,000 once he had earned back the initial $150,000. *Id.* In approximately 1996, however, Ragucci breached the contract by giving some of the Howland Hook trucking work to another company. Tr. 1789. Molfetta, who had not yet even earned back the initial $150,000, concluded that he did not owe Ragucci the additional $100,000, although he still continued providing trucking services at Howland Hook. Tr. 1789-92.

Approximately three years later—in late 1999 or early 2000—Ragucci told Molfetta that Ciccone wanted to see him.

Tr. 1792. At a meeting at the Unicorn Diner on Staten Island, Ciccone told Molfetta not to pay Ragucci any more money, and to start paying him instead. Tr. 1794-97. Molfetta testified that Ciccone asked for $2500 per month, but that he told Ciccone that he could only pay $1500, and that he would start making these payments the following month. Tr. 1802. Ciccone responded, "No, you start for last month." Tr. 1803.

Molfetta therefore started making monthly cash payments to Ciccone. When asked at the grand jury proceeding why he made these payments, Molfetta stated, "Why? Fear," adding, "I'm afraid right now. . . . [Y]ou kind of know people in that position have the power to do things to people if they don't do what they're told to do."

At the trial, however, Molfetta changed his account and stated that he had paid Ciccone not out of fear, but rather because Ciccone got him out of his contract with Ragucci. Tr. 1807. The government therefore introduced Molfetta's grand jury testimony as a prior inconsistent statement that could be admitted for its truth. Tr. 1808. When confronted with that earlier inconsistent testimony, Molfetta testified that he had simply told the government what it wanted to hear during the grand jury proceedings, because he was scared that he would be put in jail. Tr. 1809-1811. He acknowledged, however, that the government had threatened him with jail only if he gave false testimony. Tr. 1814.[6]

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6. Molfetta subsequently was charged with perjury for his trial testimony, pled guilty, and was sentenced to six months' imprisonment.

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7. The Money Laundering Counts

These counts related to the payment of illicit proceeds by lower-ranking members to the highest-ranking members of the Gambino Family as "tributes." Peter Gotti, Ciccone, and Richard G. Gotti were the defendants-appellants named in these counts. Indictment ¶¶ 162-63.

At trial, the government presented evidence about the general structure of organized crime families such as the Gambino Family, and about the practice of making tribute payments. FBI Agent Gregory Hagarty testified as an expert witness on organized crime, and explained that in the typical organized crime family in New York City, the "boss" is at the top of the hierarchy, with the "underboss" and the "consigliere" right below him, collectively making up the "administration." Tr. 232, 236. Agent Hagarty stated that when the boss is imprisoned or otherwise incapacitated, the family has "an acting boss who speaks with the same authority as the boss." Tr. 240. He explained that below the administration, there are typically a "number of captains," each of whom runs "a crew of soldiers." Tr. 236. He stated that "associates" were ranked below soldiers, sitting at the lowest level of the pyramid. *Id.* Agent Hagarty further explained that the overall purpose of an organized crime family is to generate money from illegal activities for the "administration." Tr. 238. He referred to this practice as "kicking up," explaining that "[y]ou take money from your illegal activities and kick it up to your boss. 'Tribute' is another word they use." Tr. 239.

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With regard to the Gambino Family, Agent Hagarty testified that Paul Castellano had served as boss of the family until 1985, at which point John J. Gotti became its boss. Tr. 248. Agent Hagarty further stated that John J. Gotti's son, John A. Gotti (also known as "Junior"), took over as acting boss in 1992 and served in that position until 1999. Tr. 446-48. The government further presented evidence that in 1999 (when John A. Gotti was imprisoned), his uncle Peter Gotti—brother of John J. Gotti—became acting boss of the Gambino Family. Specifically, the government introduced wiretaps of conversations between Gene Gotti (the incarcerated brother of John J. Gotti and Peter Gotti) and various visitors to the FCI McKean prison. In one such conversation on May 13, 1999, Gene Gotti stated, "My brother Pete's making the books." Gov't Exh. HTR-5. Agent Hagarty testified that this was a reference to "making new members," which could be done only by someone in the administration. Tr. 2442. In another such conversation, which occurred on January 13, 2000, Gene Gotti stated that Peter Gotti was "just there because there's nobody else to put there." Gov't Exh. HTR-10

In the wiretapped conversations, Gene also referred to tribute payments that were being made to Peter Gotti. For example, when one visitor commented to Gene on November 18, 1999, "Two thousand. A thousand each youse are getting . . . every month," Gene responded, "Where am I getting it? My wife ain't getting it. . . . Who's taking it now?" Gov't Exh. HTR-6. The visitor replied, "Your brother gets it. Your brother has it." *Id.* Subsequently, Gene commented, "They're all taking money. My brother Pete and all the rest of them." Gov't Exh. HTR-7. The visitor stated, "Gene, you've been

getting it for the last three years." *Id.* Gene said, "I never seen it the last three years. . . . [I]f you did give it to somebody, please get it back. For three years, that's a hundred and fifty thousand dollars. No, twelve, twenty-four, it's thirty-six thousand. Please get it and send it right to my house." *Id.* The visitor responded, "I'll tell your brother." *Id.* Gene said, "And from now on don't give it to my brother. . . . I don't want that. The situation is he gets it—but I haven't touched it. He was my acting capo." *Id.* Two months later, Gene instructed another visitor, "As soon as you see Peter just tell him, here. Here's eight for you, here's four for Genie." Gov't Exh. HTR-10.

Moreover, the government presented evidence indicating that the tributes were paid in cash to Peter Gotti on a monthly basis—typically the third or fourth Tuesday of each month, and transmitted from Jerome Brancato to Peter Gotti—and that these payments came from extortion, fraud, and gambling activities. For example, on the third Tuesday of April 2000 (April 18, 2000) Ciccone, Cassarino, and Brancato discussed arrangements for payments to someone they referred to only as "him." Gov't Exh. TR-154. Brancato stated, "I was out there the other day with him, I went over the whole thing with him. I'll bring it to him." *Id.* Cassarino responded, "Do it the way he told ya. . . . [J]ust take what ya gotta take . . . and give [him] everything else." *Id.* Similarly, on May 22, 2000 (which was the day before the fourth Tuesday of May 2000, *i.e.*, May 23, 2000), Ciccone told Cassarino, "[t]hat guy tomorrow. . . . [T]ell that guy, if he, he, he's a little confused and he needs to see me, I'll see him anytime he wants." Gov't Exh. TR-156. "What guy?" Cassarino asked. *Id.* "You know what I'm talkin' about, the guy that Jerry

[Brancato's] gotta see tomorrow," answered Ciccone. *Id.* Cassarino then said, "Oh, oh, oh, oh, yeah, okay. Alright." *Id.*

Similarly, on October 15, 2000—which was two days before the third Tuesday of October 2000 (October 17, 2000)—Cassarino told Bondi to go see "Eddie" [Alayev] and to "[d]o everything," stating, "I gotta make that deadline by tomorrow, and I'm not gonna make it." Gov't Exh. TR-162. At trial, Agent Hagarty testified that on October 17, 2000, Brancato met Peter Gotti near 159th Avenue and 96th Street in Howard Beach. Tr. 2356.

Once again, on November 25, 2000—which was three days before the fourth Tuesday in November (November 28, 2000)—Cassarino told Bondi, "[Y]ou're gonna have to get the whole thing from Jerome [Orsino] anyway and drop it off at Jerry [Brancato's] house." Gov Exh. TR-165. On the payment date—November 28, 2000—Bondi told Cassarino that Brancato was waiting for him at the club, "because he had to go over there today . . . you know what I'm saying?" Gov't Exh. TR-166. At trial, Agent Hagarty testified that on that same day, Brancato was seen going out to Howard Beach, and subsequently meeting Peter Gotti near 159th Avenue and 96th Street there. Tr. 2357-59.

Surveillance agents also observed Brancato meeting Peter Gotti in the same area on January 23, 2001 (the fourth Tuesday of the month). Special Agent James I. Folsom III of the FBI testified that he was on a surveillance assignment in Howard Beach that day. Tr.2095-96. He stated that he observed Peter Gotti's vehicle come into the area, and that

this vehicle then "circled the block several times—different blocks." Tr.2097-98. He testified that Brancato then arrived, carrying a "white plastic shopping bag." Tr.2098. Brancato then got into Peter Gotti's vehicle, which drove away. Tr.2097. Agent Hagarty similarly testified that Brancato was seen meeting Peter Gotti at the same Howard Beach location on February 27, 2000 (the fourth Tuesday of the month) Tr. 2361.

Wiretapped conversations from March and April 2001 indicated that the monthly tribute payments were also being derived, at least in part, from the MILA kickbacks. For example, on March 26, 2001, which was the day before the last Tuesday in March, Cassarino told Ciccone that Brancato was "gonna see him [Peter Gotti] Wednesday, not tomorrow." Gov't Exh. TR-176 Ciccone responded that Brancato was "comin' up short . . . so I'll lay out the. . . . [W]hat[,] I'm gonna send Jerry [Brancato] there with nothin' [?]" *Id.* Later in the conversation, Nasso—who was also on the phone—stated that the MILA March payment had just come in that day. Ciccone asked, "When am I going to see you? I gotta, I'm gonna lay it out," *i.e.*, provide Brancato with money for the tribute payment to Peter Gotti. *Id.* At trial, Agent Hagarty testified that on Wednesday, March 28, 2001, he observed Brancato meeting with Peter Gotti at the same Howard Beach location. Tr. 2365.

On Wednesday, April 18, 2001, Ciccone and Nasso spoke again about the money from the MILA contract. In this conversation, Nasso stated that "the Jew [Joel Grodman] gotta send me the money. . . . I gotta know when it comes in." Ciccone said, "So tell me about it, I'm laying the fucking

thing out too . . . [the] last two months, last two times." Gov't Exh. TR-178N. At trial, Special Agent Robert Rogers of the FBI stated that on Tuesday, April 24, 2001, he observed Brancato meeting Peter Gotti in the same vicinity in Howard Beach. Tr. 2168.

On April 25, 2001, Brancato was arrested in another case, after which time the payment mechanism changed. Tr. 2411. Whereas previously Brancato had been making the payments directly to Peter Gotti in Howard Beach, now Cassarino began making the payments either to Richard V. Gotti (Peter Gotti's brother) or defendant-appellant Richard G. Gotti (Richard V. Gotti's son and Peter Gotti's nephew) in Brooklyn. On Monday, June 25, 2001, for example, Cassarino noted to Ciccone, "We gotta, got that appointment Thursday . . . for the month." Gov't Exh. TR-182. At the trial, Special Agent Rogers testified that on Thursday, June 28, 2001, he followed Cassarino—who was carrying a blue plastic bag—to the Sheepshead Bay neighborhood of Brooklyn, where Cassarino then entered Maria's Restaurant. Tr. 2200-01. Richard G. Gotti's car was seen in the parking lot of the restaurant. Tr. 2202-03.

On Wednesday, September 26, 2001, Cassarino indicated to Ciccone that he had initially thought he had "that number," *i.e.*, the full tribute payment, but that "I don't have it." Gov't Exh. TR-189. The following day, Ciccone indicated that he would advance Cassarino the money: "[H]ere's what I'm gonna. . . . I'm gonna give you [money] that's from this guy. Gonna go see him tomorrow, alright. So this way, if I have to lay it out [in advance], I'm gonna see him tomorrow morning." Gov't Exh. TR-189A. The "him" to whom Ciccone

was referring was apparently Frank Molfetta—who, as described above, was being extorted for monthly payments by Ciccone—given that the following morning (September 28, 2001), Captain James McGowan of the Waterfront Commission of New York Harbor observed a meeting between Ciccone and Molfetta at a diner on Staten Island, during which Molfetta passed an envelope across the table to Ciccone, stating "it's all there, hundreds." Tr. 1863, 1870.

On November 29, 2001, law enforcement officers executed search warrants on Cassarino and Richard G. Gotti after observing a meeting between them at Maria's Restaurant in Brooklyn. They recovered $12,000 in cash from Richard G. Gotti's pants pockets. Tr. 2315-2316. Cassarino later reported to Ciccone that "[r]emember what happened to Jerry [Brancato] last time [*i.e.*, being apprehended by law enforcement]? . . . Just happened to me." Gov't Exh. TR-202. Ciccone noted, "we should change it," an apparent reference to the existing tribute payment mechanism. *Id.* Cassarino agreed: "Definitely, without a doubt." *Id.* Ciccone reiterated, "Yeah. Fuck that. I don't wanna go to jail." *Id.* Cassarino reflected, "They [the officers] gave me his card, that fucking [Captain] McGowan, that prick." *Id.*

8. The Tommy Ragucci Counts

These counts alleged that certain defendants, including defendant-appellant Ciccone, had conspired and unsuccessfully attempted to extort Tommy Ragucci (referred to in the indictment as "John Doe 1"), an employee at Howland Hook (and the brother of Carmine Ragucci), by ordering him to resign from his position there so that it could

be filled by Bobby Anastasia, who was related to a Gambino Family member. Indictment ¶¶ 168-171.

In support of these charges, the government introduced testimony from Scollo, who stated that in the summer of 2001, Ciccone (either directly or through Cassarino) ordered him to tell Tommy Ragucci to leave his position. Tr. 1516. Scollo explained that Ciccone wanted to remove Tommy Ragucci from the position so that Bobby Anastasia could be placed there. Tr. 1518. Scollo further testified that he carried out these orders, but that Tommy Ragucci said that he would not resign. Tr. 1516-17.

Tommy Ragucci, in turn, testified that in approximately August of 2001, Scollo approached him and stated "that his boss wanted me to step down." Tr.1901. He asked Scollo who his boss was; Scollo responded, "Sonny." *Id.* Tommy understood that this meant "Sonny Ciccone." Tr.1902. He stated that upon receiving this order, "I felt very—I would say I felt intimidated." Tr.1903. He subsequently had a "sit-down" with Scollo, at which point he asked whether he could talk directly to Ciccone. *Id.* Scollo responded, "No way, can't happen." Tr.1904. Tommy Ragucci then told Scollo that he was not willing to step down. *Id.* Scollo "was very upset and he left." *Id.*

The government also presented a July 19, 2001 wiretapped conversation in which Ciccone told Cassarino that he wanted the "Bobby A" [Bobby Anastasia] task to be done "as soon as possible," Gov't Exh. TR-118, as well as a July 26, 2001 wiretapped conversation, in which Scollo reported to Ciccone: "I grabbed Tommy yesterday and I told

him, listen to me." Gov Exh. TR-119. Ciccone responded, "Tell him I don't want him there. Tell him I don't want him there. . . . Say you're only there because I gave your brother [Carmine] a fucking chance. That's it. That's it. Now you're out." Scollo replied, "I told him as soon as possible." *Id.* Ciccone reiterated, "And not the end of the summer. As soon as possible, maybe within the next thirty days."

Scollo subsequently reported, in an August 6, 2001 wiretapped conversation with Cassarino, that "I spoke to Tommy. He said he don't feel like he wants to step down." Gov't Exh. TR-120. When Ciccone later learned that Tommy Ragucci was still in his position, he remarked to Cassarino and Bondi, "We gonna do, we gotta get rid of this fuckin' guy." Gov't Exh. TR-121. Evidently, however, the matter was ultimately dropped, because as of the trial, Tommy Ragucci was still working at the Howland Hook terminal. Tr. 1897.

9. The Zinna Count

This count alleged that certain defendants, including defendant-appellant Ciccone, had conspired to extort $5,000 from Leonardo Zinna (referred to in the indictment as "John Doe 2"), after they learned that Zinna had charged two people $3,000 each for waterfront jobs. Indictment ¶ 173.

The evidence supporting this conspiracy charge was straightforward. At trial, the government introduced into evidence a wiretapped conversation in which Ciccone stated to Cassarino and Scollo, in regard to Zinna, "[G]et a hold of this guy. . . . He got to bring us five. . . . 'Cause, you know what, you cocksucker?. . . . You took six. You gave back

three. Now we want five from you." Ciccone reiterated: "Fuck him. Tell him I want five." Gov't Exh. TR-115.

10. The Marinelli Counts

These counts alleged that certain defendants, including defendant-appellant Ciccone, conspired to extort, and did extort, a certain sum of money from Nicola Marinelli (referred to in the indictment as "John Doe 3"). Indictment ¶¶ 174-177.

At trial, the government adduced evidence that after Marinelli sought (at the suggestion of his attorney, Tr. 2765-66) the help of Ciccone and Cassarino in obtaining his workmen's compensation payments, they extorted him for a portion of these proceeds. Specifically, wiretap evidence demonstrated that after Marinelli was set to receive his payments, Cassarino ordered Marinelli's son, Vito, to bring money to him. In the wiretapped conversation, Cassarino asked Vito whether everything had been "straightened out" with his father. Gov't Exh. TR-222. When Vito responded affirmatively, Cassarino responded, "Alright, 'cause you got to come and see me, right?" *Id.* Vito then expressed nervousness (apparently about how much money to bring), stating, "I wanna know what you think is the right thing. Know what I'm saying?" *Id.* Cassarino responded, "I don't know. Whatever you think. That's what he [Ciccone] told me and then they'll just take it from there." *Id.* Vito responded, "I, I, I don't want to do the wrong thing." *Id.* Cassarino responded, "[I]f it's wrong, I'll tell ya." Vito said, "we're waiting for the, ah, for the check. . . . Then we'll come see ya." *Id.*

Vito further testified at trial that he was "afraid to do the wrong thing," and that after he paid Cassarino $5,000, Cassarino informed him that this was insufficient and that the payment needed to be around $20,000 to $25,000. Tr. 2781-86. After Vito informed his father that Cassarino and Ciccone were unsatisfied, the family ultimately paid another $5,000. Tr. 2786-90.

11. The Alayev Counts

These counts alleged that certain defendants—including defendants-appellants Ciccone and Bondi—had conspired to extort, and had extorted, the following property interests from Eduard Alayev (referred to in the indictment as "John Doe 4"), the owner of a café in Brooklyn: (1) money; (2) the right to refuse to keep illegal gambling machines at a business; and (3) the right to sell a business free from outside pressure. Indictment ¶¶ 178-185.

At trial, Alayev testified that he and his business partner (his brother) had purchased the café—called Café Roma—in October of 1999 from someone named Rocco Ritorto. Tr. 2478-79.[7] He further testified that about two months after purchasing Café Roma, Cassarino and Bondi (whom Alayev referred to, respectively, as "Primo" and "Richie") came together to tell him that they wanted to install gambling machines at the cafe. Tr. 2488-89. Alayev refused, but Cassarino "responded by saying, 'Whether you want it or not, I'm going to install the gambling machines.' " Tr. 2488. Cassarino stated that if Alayev would not let him install the

7. Evidently, however, legal ownership of the café was never transferred into Alayev's name. Tr. 2508.

machines, Alayev would have to pay him $1,000 each month, adding that "the neighborhood [was] all his territory." *Id.* Alayev wanted to call the authorities, but was "very afraid for [his] family," and thus did not do so. Tr. 2492.

Alayev stated that three gambling machines were subsequently installed in the back room of his restaurant while he was out shopping. Tr. 2492-93. Alayev told Cassarino that he was afraid that if the gambling machines were found, Café Roma would lose its liquor license, to which Cassarino responded, "[Y]ou are not going to be responsible for anything, if any tickets [ ] come, we'd pay your ticket." Tr. 2493. Alayev added that Bondi began coming to Café Roma to collect money from the machines, and would typically give him a portion of the proceeds. Tr. 2495-96.

The police subsequently appeared at Café Roma, broke all of the gambling machines, and arrested Alayev. Tr. 2494. Alayev moved the broken machines down to the basement and told Cassarino that the machines "are not going to be here anymore." Tr. 2498. Someone nonetheless subsequently came to Café Roma to install one or two new gambling machines. Tr. 2502. Alayev did not let the person install the machines. *Id.* Cassarino then called him and said something "to the extent [of] 'whether you want it or not, we're going to install the machines.' " *Id.* People later returned with the machines and stored them in the basement. Tr. 2503. Alayev noted, "[i]t was not really possible to stop them because they were big people and like I'm really like a small person. I couldn't really stop them." Tr 2503. Alayev then closed the kitchen of the restaurant, "[b]ecause the machines were there and I didn't like the police to come again and see the machines again." *Id.*

Appendix A

In December of 2000, Alayev decided that he wanted to sell Café Roma. Tr. 2498. Cassarino ultimately became closely involved in the details of this sale, telling Alayev that he wanted Café Roma to be sold to someone named Lenny Kogan, and that Alayev "should not sell it to anybody but Lenny." Tr. 2504. He told Alayev that Kogan would pay $40,000 for Café Roma. *Id.* Cassarino ended up taking a portion of that money for himself. Tr. 2512-14.

In addition to Alayev's trial testimony about these events, the government also introduced wiretapped conversations in which Bondi provided Cassarino with information about Alayev (whom they referred to as "Eddie") and the goings-on at Café Roma. Gov't Exh. TR-300; Gov't Exh. TR-313. For example, in one conversation, Bondi complained to Cassarino about Alayev, stating "this cocksucker Eddie . . . was telling them he don't want nobody walkin' through his kitchen" (where the gambling machines were located). Gov't Exh. TR-300. Cassarino responded, "so grab the guy Eddie, and tell the guy Eddie, 'who the fuck are you to tell us that thing?' " Bondi said, "I told 'em, I told 'em." *Id.* In other wiretapped conversations, Cassarino reported to Ciccone about the details of the Café Roma sale. Gov't Exh. TR-320; Gov't Exh. TR-324.

12. The Seagal Counts

These counts alleged that certain defendants, including defendant-appellant Ciccone, conspired and attempted to extort the film actor Steven Seagal (referred to in the indictment as "John Doe 5"), by trying to obtain money from him and attempting to get him to do business with them. Indictment ¶¶ 58-59.

Appendix A

At trial, Steven Seagal testified that he became good friends with Jules Nasso (the brother of Vincent Nasso of GPP/VIP) in the late 1980s. Tr. 2928-29. At Jules Nasso's request, Seagal brought him into the movie business, and the two men formed a production company called Seagal-Nasso. Tr. 2930. In the mid-1990s, however, Seagal grew to believe that Jules Nasso's personality had changed. Tr. 2931-32. He decided that he did not want to work with Jules Nasso any longer and severed the business relationship in the late 1990s. Tr. 2933-34. According to Seagal, Jules Nasso was unhappy about the end of the relationship, and told Seagal that Seagal owed him approximately one million dollars. Tr. 2935. Seagal's accountants and attorneys, however, disagreed, telling Seagal that Jules Nasso owed him money, rather than vice versa. Tr. 2935.

In October of 2000, during the making of the movie "Exit Wounds" in Toronto, Seagal received a visit from Jules Nasso's brother, Vincent Nasso, along with Ciccone and Cassarino. Tr. 2937-39. At that meeting, according to Seagal, Ciccone told him that he thought it would be "really nice if I worked with Jules again and that Jules' mother also wanted us to work together." Tr. 2939. When Seagal indicated that he was not sure whether that would be possible, Ciccone became silent, making Seagal feel uncomfortable. Tr. 2939-2940.

Seagal testified that he later met with Ciccone in New York, after having received many calls from Vincent Nasso telling him that Ciccone "wanted to see me." Tr. 2942. When Seagal arrived at the Nassos' mother's house for the meeting, he was informed that the meeting had been moved somewhere

else, which made Seagal feel "increasingly uncomfortable." Tr. 2943. Seagal then got into a car (accompanied by his assistant) and was taken to a restaurant, where Ciccone, Cassarino, Jules Nasso, and Vincent Nasso were sitting at an upstairs table. Tr. 2944. Ciccone began talking to Seagal about "monies that I owed Jules ··· he then went into the fact that he wanted me to work with Jules and that was important to him and I again told him that I'm trying." Tr. 2945-46. At this point, Ciccone ordered him to "look at me when you are talking." Tr. 2946. Ciccone then said: "Look, we're proud people and you work with Jules . . . Jules is going to get a little and the pot will be split up. . . . We'll take a little." *Id.* The meeting ended with Seagal stating that he "would try to work with Jules." Tr. 2947. Seagal testified that as he walked out of the restaurant, Jules started walking with him and said "something to the effect of 'You know, it's a good thing you said this and didn't say that because if you would have said the wrong thing, they were going to kill you.' " Tr. 2948.

Seagal further testified that on the morning of the March 2001 premiere of "Exit Wounds," Ciccone—accompanied by Jules and Vincent Nasso, Cassarino, and another man—showed up at his home, at which point Ciccone claimed that Seagal owed them $3 million, stating "I told you what I want and I don't think you are getting it." Tr. 2956. Ultimately, Seagal paid Jules Nasso between $500,000 and $700,000, which he testified at trial arose from a previous "stock issue where he had put some of his own money up to buy stock with me." Tr. 2957. Seagal also contacted a former acquaintance of his, who was then in prison in New Jersey, and "explained to him this misunderstanding that was going on and I asked him if he could speak with these people on

my behalf, be sort of a peacemaker and see if there is a way that this all could be settled in a businesslike manner." Tr. 2960-62. After that, Jules and Vincent Nasso came to Seagal's home and told him to "forget about Sonny, forget about us, forget about everything, good-bye." Tr. 2962. Jules subsequently filed a $60 million civil lawsuit against Seagal. Tr. 2962-63.

The government also introduced a wiretapped conversation in which Ciccone and Jules Nasso discussed their interactions with Steven Seagal, and in which Ciccone stated, "We were gonna tell [Seagal] that every movie he makes ··· we want a hundred and fifty thousand," and told Jules, "I want you to talk to him. . . . Don't treat him with kid gloves." Gov't Exh. TR-257.

13. The Gambling Counts

These counts alleged that certain defendants, including Ciccone and Bondi, had run an illegal bookmaking business as well as an illegal joker-poker gambling operation. Indictment ¶¶ 202-205. The bookmaking charge rested on the allegation that Ciccone, Bondi, and other Gambino Family co-defendants had run the New York operation of the Costa Rica-based Pelican Sports bookmaking business from approximately September 18, 2000 to December 2001. The joker-poker charge rested on the allegation that several defendants, including Ciccone and Bondi, had operated a large-scale gambling business that employed joker-poker electronic gambling devices, including those placed at Café Roma.

Appendix A

a. *The Bookmaking Charges*

At trial, with regard to the bookmaking charges, the government adduced evidence that numerous defendants—including defendants-appellants Bondi and Ciccone as well as defendants Cassarino, Brancato, Malara, Orsino, and Lisi—had collectively run the New York operation of the Pelican Sports bookmaking business. This evidence included various wiretapped conversations that indicated the respective roles of Bondi and Ciccone in the operation. As to Bondi, the wiretaps indicated that he participated in paying winning bettors, collecting from losing bettors, and "freezing" bettors who owed money. Indeed, in one conversation between Bondi and Cassarino, Bondi reported that they had to freeze a particular bettor, stating, "He don't have it till Wednesday. . . . So he's froze." Gov't Exh. TR-515. Cassarino responded, "[W]hat is he, what is he up, up or minus? . . . That's the important part before you freeze him. . . . If he's up, you don't want to freeze him." *Id.* Bondi responded, "Alright, well let me call, I call him right, then I call you back." *Id.* Approximately six minutes later, Bondi called back to report that the bettor was "minus twenty-two," to which Cassarino replied, "Good. Freeze it." Gov't Exh. TR-516. Similarly, in a conversation between co-defendants Cassarino and Lisi, the men discussed the need to talk to "Richie" [Bondi] about a bettor who wanted to "straighten out now, so he could play tonight." Gov't Exh. TR-508.

The wiretap evidence also indicated that Ciccone acted as the ultimate supervisor of the bookmaking business, with Cassarino reporting directly to him. In several wiretapped

conversations between Cassarino and Ciccone, Cassarino provided an update as to the various business developments. On October 1, 2001, Cassarino reported to Ciccone, "[W]e had a decent fuckin' week." Gov't Exh. TR-426. Ciccone asked, "How many guys are bettin' [?]" *Id.* Cassarino responded: "About ah . . . thirty . . . thirty guys . . . but see one guy we got on commission . . . one guy, in other words, one, one guy is on a forty percent sheet . . . the kid Jerome [Orsino] . . . we get all his players . . . instead of givin' him fifty-fifty sheet we're givin' him forty percent." *Id.* Ciccone replied, "Now you're gonna give him thirty." *Id.* Cassarino replied, "Cut him down to thirty, yeah . . . come down thirty . . . he'll do us a favor . . . don't worry about it."[8] *Id.*

The government also introduced wiretapped conversations between a number of co-defendants who had participated in the operation. For example, in one wiretapped conversation between Brancato and Malara, Brancato referred to a particular player, "Soldier," with whom he had experienced "a little problem." Gov't Exh. TR-555. In a subsequent conversation, Malara told Brancato, "Soldier's

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8. At trial, New York City Police Department Detective Kevin Martin (an expert on the subject of illegal gambling) explained that this meant that "Jerome Orsino ha[d] a 40 percent sheet, meaning someone has a sheet arrangement, arrangement with bettors on-under his sheet. He has to have some type of arrangement with the bookmaker. Either you [are] submitting 50-50 sheet, you are submitting half the winnings, half the losings. They all do go from there 40 percent or 30 percent or quarter sheet, 25 percent sheet." Tr. 3436. When asked what the difference was between a 40 percent sheet and a 30 percent sheet, Detective Martin explained that it referred to "how much either gives out or adds in." Tr. 3437.

gettin', well, you know, I, I got him for the week plus twenty-eight-ten. . . . And the other guy. . . . I believe you're collecting like fourteen and change, turning seventy-one-o-seven." Gov't Exh. TR-563. Brancato then stated, "What I'm gonna do, I'll straighten the whole thing out with you." *Id.*

In addition, the government introduced Detective Martin's testimony that documents with betting figures had been seized from the residences of Cassarino and Lisi. Tr. 3452-56. Detective Martin explained that the documents from Cassarino's residence listed the "weekly figures of each person" in the stable of bettors that was managed by the co-defendants, and that the figures were broken down by "the account number, the name, each day of the week, how much they're up or down and their [betting] cap at the end." Tr. 3453. He stated that the documents seized from Lisi's residence included figures for three particular bettors managed by Lisi. Tr. 3454-55. One bettor appears to have been up by $5800 for the week; another was listed as being up by $3380. Tr. 3456. Detective Martin also testified that documents removed from Bondi's residence included gambling records. Tr. 3456-57.

b. *The Joker-Poker Charges*

On the joker-poker charges, the government presented evidence at trial that Ciccone, Bondi, and other co-defendants had run a gambling operation using "joker-poker" electronic gambling machines at a number of locations, including Café Roma. In addition to Alayev's testimony about the defendants' having forced him to install gambling machines at Café Roma, the government also introduced the testimony

of various law enforcement officials. For example, Detective Paul Grzegorski of the New York City Police Department testified that on August 23, 2000, he observed Bondi entering Frank & Sal's Hair Stylists in Brooklyn, going over to a gambling device located therein, opening the device with a key, and removing the currency from the device. Tr. 3236-39. When asked to describe the device, Detective Grzegorski stated, "You put money into it and you bet credits and you play the credits and you get basically what is called extended play. If you win, you get additional credits and you can get paid off on those credits." Tr. 3238. Detective Grzegorski further stated that after observing this, he stopped Bondi as he was exiting the shop and placed him under arrest. Tr. 3239. He then searched Bondi and found on his person a list of locations with gambling devices. Tr. 3240-3253. Detective Martin provided additional testimony as to how the gambling devices in question worked: "You insert a sum of U.S. currency into the machine, you receive credits for your currency, and you play those credits, and during that course of the game you play the credits until you win a game, if it is cherries, bells, plums, whatever it may be." Tr. 3508.

14. The Witness Tampering Count

This count alleged that certain defendants, including defendant-appellant Ciccone, had tampered with a witness in this case before it went to trial. Indictment ¶ 206. That witness was Bondi's stepson, Anthony Frazetta, whom the government had served with a grand jury subpoena.

At trial, the government adduced wiretap evidence indicating that in a February 11, 2002 conversation between

Ciccone, Bondi, and co-defendant Primo Cassarino, Ciccone said the following about Frazetta: "This fucking Joe, I don't know where the fuck his mentality is. If, if, if you start to answer and they can ask you everything and anything . . . Every fucking thing has got nine fucking questions. You know what I'm saying? . . . He goes, so how'd you get this job? It was my father, my father. Who is your father's friend? Sonny Ciccone. . . . He's taking the [F]ifth. I don't want to hear it." Gov't Exh. TR-461. When Cassarino indicated that Frazetta had apparently provided some information already, Ciccone responded, "yeah, but why, but he opened up a Pandora's Box. 'Cause they ask you one question, they ask you another." *Id.*

On February 18, 2002, Frazetta's lawyer advised the government by letter that Frazetta would assert his Fifth Amendment privilege against self-incrimination. On February 20, 2002, when Frazetta was scheduled to appear before the grand jury, Cassarino commented to Ciccone, "[T]hat kid is going there today." Gov't Exh. TR-462. The next day, Ciccone asked Cassarino, "how'd Richie's kid do?" Gov't Exh. TR-463. Cassarino reported that there had been some uncertainty as to whether the court would accept Frazetta's letter asserting the privilege, and that apparently Frazetta would have to return in person. *Id.* Cassarino noted that he had told Bondi that Frazetta "shoulda went there with the lawyer and fucking hand in the letter. If they accept it, they accept it; they don't accept it, you're there." *Id.* Ciccone replied, "That was stupid, what the lawyer did. He shoulda made him go there anyway." *Id.* Cassarino reiterated: "Just go in there, do what you gotta do, and get the fuck out. . . . That's all, you take the [F]ifth and that's it. Goodbye." *Id.* Ciccone agreed: "That's the end of it." *Id.*

Appendix A

C. The Verdicts

1. Peter Gotti

Peter Gotti was convicted of Racketeering (Count 1), Racketeering Conspiracy (Count 2), Money Laundering Conspiracy (Count 28), and on the Money Laundering Counts as to 10/17/00 (Count 31), 11/28/00 (Count 32), 1/23/01 (Count 35), 2/27/00 (Count 37), 3/28/01 (Count 38), and 4/24/01 (Count 40).

He was acquitted of Money Laundering as to 9/19/00 (Counts 30) and 12/26/00 (Count 34).

2. Richard G. Gotti

Richard G. Gotti was convicted of Racketeering (Count 1), Racketeering Conspiracy (Count 2), Money Laundering Conspiracy (Count 28), and on the Money Laundering Counts as to 6/27/01 (Count 42), 8/31/01 (Count 43), 10/25/01 (Count 45), and 11/29/01 (Count 46).

3. Anthony Ciccone

Ciccone was convicted of Racketeering (Count 1), Racketeering Conspiracy (Count 2), Conspiracy to Extort ILA (Count 3), Extortion of the ILA (Count 4), Scheme to Defraud the Membership of the ILA (Counts 6 and 7), Conspiracy to Extort MILA (Count 8), Extortion of MILA (Count 9), Scheme to Defraud MILA as to 9/11/00 (Count 11), Scheme to Defraud MILA as to 9/16/01 (Count 13), Conspiracy to Extort Local 1 (Count 14), Attempted Extortion of Local 1

(Count 15), Scheme to Defraud Local 1 as to 6/30/00 and 6/27/01 (Counts 17 and 18), Scheme to Defraud Local 1814 as to 11/3/00, 2/7/01, 6/17/01, and 8/22/01 (Counts 20-23), Conspiracy to Extort Howland Hook Container Terminal (Count 24), Extortion of Howland Hook Container Terminal (Count 25), Conspiracy to Extort Owner of a Trucking Company (Count 26), Extortion of Owner of a Trucking Company (Count 27), Money Laundering Conspiracy (Count 28), Money Laundering as to multiple dates (Counts 29-35, 37-46), Conspiracy to Extort John Doe 1 (Count 49), Attempt to Extort John Doe 1 (Count 50), Conspiracy to Extort John Doe 2 (Count 51), Conspiracy to Extort John Doe 3 (Count 52), Extortion of John Doe 3 (Count 53), Conspiracy to Extort John Doe 4 (Count 54), Extortion of John Doe 4-Money (Count 55), Extortion of John Doe 4-Right to Refuse to Keep Gambling Machines at a Business (Count 56), Extortion of John Doe 4-Right to Sell a Business (Count 57), Conspiracy to Extort John Doe 5 (Count 58), Attempted Extortion of John Doe 5 (Count 59), Illegal Gambling Business-Joker/Poker (Count 66), Illegal Gambling Business-Sports Betting Operation (Count 67), and Witness Tampering (Count 68).

He was acquitted as to Scheme to Extort MILA as to 11/14/01 (Count 12), Conspiracy to Extort Relatives of a Prospective Employee (Count 47), Extortion of Relatives of a Prospective Employee (Count 48), Conspiracy to Use Extortionate Means to Collect an Extension of Credit from John Doe 8 (Count 64), and Use of Extortionate Means to Collect an Extension of Credit from John Doe 8 (Count 65).

4. Richard Bondi

Bondi was convicted of Racketeering (Count 1), Racketeering Conspiracy (Count 2), Conspiracy to Extort Local 1 (Count 14), Attempted Extortion of Local 1 (Count 15), Scheme to Defraud Local 1 (Counts 17-18), Conspiracy to Extort John Doe 4 (Count 54), Extortion of John Doe 4-Money (Count 55), Extortion of John Doe 4-Right to Refuse to Keep Gambling Machines at a Business (Count 56), Extortion of John Doe 4-Right to Sell a Business (Count 57), Illegal Gambling Business-Joker/Poker (Count 66), and Illegal Gambling Business-Sports Betting Operation (Count 67).

He was acquitted as to Conspiracy to Use Extortionate Means to Collect an Extension of Credit from John Doe 7 (Count 62) and Use of Extortionate Means to Collect an Extension of Credit from John Doe 7 (Count 63).

D. The Sentences

1. Peter Gotti

Peter Gotti was sentenced to a term of imprisonment of 115 months, less 85 days that he had served in administrative confinement. The district court also imposed an order of forfeiture against Peter Gotti in the amount of $3,749,250.

2. Richard G. Gotti

Richard G. Gotti was sentenced to a term of imprisonment of 33 months. As noted above, his sentence

has already been remanded to the district court pursuant to *Crosby*; upon reconsideration, the district court declined to resentence him.

3. Anthony Ciccone

Ciccone was sentenced to a term of imprisonment of 180 months. He also received an order of restitution of $1,601,499 and an order of forfeiture of $1,636,499.

4. Richard Bondi

Bondi was sentenced to a term of imprisonment of 57 months and an order of restitution of $311,894.

II. CHALLENGES BY THE DEFENDANTS TO THEIR CONVICTIONS

A. The Defendants' Challenge under *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003) (*"Scheidler II"*)

The defendants-appellants first argue that numerous extortion counts in the indictment became invalid upon the issuance of *Scheidler II*, which was decided by the Supreme Court on February 26, 2003, just as the trial in this case was concluding. For Ciccone and Bondi, who were charged with and convicted of multiple Hobbs Act extortion counts (both as separate offenses and as RICO predicates, as set forth in detail above), this argument goes to their actual convictions. For Peter Gotti and Richard G. Gotti, this is a sentencing issue: they were not charged with extortion, but the extortion

counts included in the indictment were considered by the district judge as relevant uncharged conduct under the Sentencing Guidelines when imposing their sentences.

It is undisputed that we evaluate the legal issues of whether the indictment properly charged Hobbs Act extortion and whether the district court correctly charged the jury on these counts under a *de novo* standard. In assessing these issues, we begin by discussing *Scheidler I* and analyzing its scope. We then apply our interpretation of *Scheidler II* to each of the challenged extortion counts in this case, and ultimately conclude that each of them can stand.

1. The *Scheidler II* Decision

Scheidler II, as set forth below, tightened the requirements for finding that a defendant has committed extortion under the Hobbs Act. To appreciate the significance of Scheidler II, it is therefore necessary to begin with the text of the Hobbs Act, upon which the challenged extortion counts here rested. It provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or *extortion or attempts or conspires so to do*, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). The Hobbs Act further defines "extortion" as

> *the obtaining of property from another*, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2) (emphasis added).

Before *Scheidler II*, this Circuit (and others) had interpreted the phrase "the obtaining of property from another" quite broadly, in two key respects: (1) "property" had been held to encompass intangible as well as tangible property rights; and (2) "obtaining" had been held to encompass cases where the defendant caused a loss of or interference to the victim's property rights, even though the defendant had not actually sought to exercise those property rights for himself or herself. Clear examples of these two propositions can be found in our precedents.

As to the first proposition—namely, the expansive interpretation of "property"—our Circuit's decision in *United States v. Tropiano*, 418 F.2d 1069 (2d Cir.1969), stands as an early landmark case. The *Tropiano* defendants were partners in a garbage collection company who were displeased when a new competitor, Caron Refuse Removal, Inc. ("Caron"), started soliciting business in their vicinity and taking away some of their customers. *Id.* at 1072. They then used threats of violence to force Caron to stop recruiting their customers and to agree not to solicit any business in the area. *Id.* On appeal, this Court upheld the *Tropiano*

defendants' Hobbs Act extortion convictions, rejecting their argument that "nothing more than 'the right to do business' in the Milford area was surrendered by Caron and that such a right was not 'property' 'obtained' by the appellants." *Id.* at 1075. We explained:

> The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things but includes, in a broad sense, any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property.
>
> Obviously, Caron had a right to solicit business from anyone in any area without any territorial restrictions by the appellants and only by the exercise of such a right could Caron obtain customers whose accounts were admittedly valuable. Some indication of the value of the right to solicit customers appears from the fact that when the [*Tropiano* defendants' company's] accounts were sold for $53,135, [the] agreement [obtained from Caron] not to solicit those customers was valued at an additional $15,000. . . . Caron's right to solicit accounts in Milford, Connecticut constituted property within the Hobbs Act definition.

Id. at 1075-76 (internal citations omitted). More recently, this Circuit similarly held that "[t]he right of the members of a union to democratic participation in a union election is

property; that the right is intangible does not divest it of protection under the Hobbs Act," and on that basis, crime families who sought to replace control of the union could be found guilty of conspiracy to commit extortion. *United States v. Bellomo*, 176 F.3d 580, 592-93 (2d Cir.1999).

As for the second proposition (the expansive interpretation of "obtaining"), in *United States v. Arena*, 180 F.3d 380 (2d Cir.1999), this Court held—in a case involving anti-abortion protestors who tried to shut down a clinic—that the "obtaining" prong of the Hobbs Act's definition of "extortion" was satisfied in cases where an extortionist used violence to force his victim to abandon the property rights in question, even though the extortionist was not seeking to exercise those property rights for himself. The *Arena* Court explained that "where the property in question is the victim's right to conduct a business free from threats of violence and physical harm, a person who has committed or threatened violence or physical harm in order to induce abandonment of that right has obtained, or attempted to obtain, property within the meaning of the Hobbs Act." *Id.* at 394.

This second proposition was evaluated by the Supreme Court in *Scheidler II*, which implicated facts similar to those in *Arena*. In *Scheidler II*, the defendants were anti-abortion protestors who had attempted to shut down abortion clinics. 537 U.S. at 398, 123 S.Ct. 1057. The plaintiffs argued that these defendants—"by using or threatening to use force, violence, or fear to cause respondents 'to give up' property rights, namely, 'a woman's right to seek medical service from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide

medical services free from wrongful threats, violence, coercion, and fear' "—had committed extortion under the Hobbs Act. *Id.* at 400-401, 123 S.Ct. 1057. The Seventh Circuit agreed, stating that "the defendants assert that, even if 'property' was involved, the defendants did not 'obtain' that property; they merely forced the plaintiffs to part with it . . . [but] this argument is contrary to a long line of precedent in this circuit." *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 709 (7th Cir.2001).

The Supreme Court reversed. Initially, the Court noted that on appeal, the respondents "had shifted the thrust of their theory" with regard to precisely which property rights had been extorted from them. *Scheidler II*, 537 U.S. at 401, 123 S.Ct. 1057. It stated that although the respondents had argued below that the extorted property rights were those of the women and the clinics to receive and perform medical services, they

> now assert that petitioners violated the Hobbs Act by "seeking to get control of the use and disposition of respondents' property." They argue that because the right to control the use and disposition of an asset is property, petitioners, who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain respondents' property.
>
> The United States offers a view similar to that of respondents, asserting that "where the property at issue is a business's *intangible* right to exercise

> exclusive control over the use of its assets, [a] defendant obtained that property by obtaining control over the use of those assets."

Id. (internal citations omitted; alteration and emphasis in original).

The Court then concluded that even this revised construction was inconsistent with the Hobbs Act's explicit reference to "obtaining of property from another," 18 U.S.C. § 1951(b)(2). *See id.* at 402, 123 S.Ct. 1057. It stated that

> [w]e need not now trace what are the boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets. . . . Whatever the outer boundaries may be, the effort to characterize petitioners' actions here as an 'obtaining of property from' respondents is well beyond them.

Id. The Court went on to state that the anti-abortion protesters had neither

> pursued nor received something of value from respondents that they could exercise, transfer, or sell. To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that

> merely interfering with or depriving someone of property is sufficient to constitute extortion.

Id. at 405, 123 S.Ct. 1057 (internal citation and quotation marks omitted).

The Court also explained that such a construction would eliminate the distinction between "extortion and the separate crime of coercion. . . . The crime of coercion, which more accurately describes the nature of petitioners' actions, involves the use of force or threat of force to restrict another's freedom of action." *Id.* The Court found it telling that in drafting the Hobbs Act, Congress had specifically included extortion as a Hobbs Act violation, while not including coercion. *Id.* at 406-07, 123 S.Ct. 1057. The Court concluded that "[b]ecause . . . [the anti-abortion protestors] did not obtain or attempt to obtain property from respondents, . . . there was no basis upon which to find that they committed extortion under the Hobbs Act." *Id.* at 409, 123 S.Ct. 1057.

Justice Stevens, the lone dissenter, protested that the *Scheidler II* majority's "murky opinion seems to hold that this phrase ['the obtaining of property from another'] covers nothing more than the acquisition of tangible property," and that "[n]o other federal court has ever construed this statute so narrowly." *Id.* at 412, 123 S.Ct. 1057 (Stevens, *J.*, dissenting). In other words, Justice Stevens argued that *Scheidler II* had struck down not only the second proposition (the expansive definition of "obtaining") but also the first proposition (the expansive definition of "property"). *Id.* at 412-16, 123 S.Ct. 1057.

The majority opinion, however, expressly disclaimed the notion that it swept so broadly. Indeed, in addition to stating that it "need not now trace what are the outer boundaries of extortion liability under the Hobbs Act," such as whether "liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets," the majority explicitly stated that "the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as . . . *Tropiano* . . . , in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts constituted property within the Hobbs Act definition." *Id.* at 402 & n. 6, 123 S.Ct. 1057 (internal quotation marks omitted).

In construing the scope of the *Scheidler II* holding, we are guided by the majority's explicit statement that *Scheidler II* did not even reach, much less reject, our holding in *Tropiano*. Indeed, we believe that the appropriate interpretation of *Scheidler II* must be one that co-exists with *Tropiano*, both as to the "property" and "obtaining" prongs. Thus, as an initial matter, we easily conclude that *Scheidler II* did not overturn *Tropiano's* broad interpretation of the Hobbs Act's reference to "property," nor otherwise suggest that only tangible property rights can be extorted under the Hobbs Act. The *Scheidler II* majority, in going out of its way to emphasize that it was not reaching *Tropiano*, essentially said as much. Indeed, *Scheidler II* consistently emphasized that it was only tightening the "obtaining" requirement of the Hobbs Act, and that in this regard, an important inquiry was whether the defendants had "pursued [or] received something of value from [victims] that they could exercise,

transfer, or sell." *Id.* at 405, 123 S.Ct. 1057 (internal quotation marks omitted). In the case of the anti-abortion protestors who sought only to shut down abortion clinics, they had not. Generally speaking, however, intangible property rights—such as, for instance, non-competition or exclusivity agreements—are certainly things of value that are capable of being exercised, transferred, or sold. We therefore read *Scheidler II* as leaving intact this Circuit's precedent that intangible property rights can qualify as extortable property under the Hobbs Act and as simply clarifying that before liability can attach, the defendant must truly have obtained (or, in the case of attempted extortion, sought to obtain) the property right in question.

The more complex question is precisely what, pursuant to *Scheidler II*, it means to "obtain" a property right. The *Scheidler II* Court framed this question as a two-part inquiry that requires both a deprivation and an acquisition of property, explaining that while the anti-abortion protestors in that case "may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, . . . they did not acquire any such property." *Id.* at 404-05, 123 S.Ct. 1057. In further explaining why the anti-abortion protestors could not be viewed as having acquired such property, the Court stated that they had "neither pursued nor received something of value from respondents that they could *exercise, transfer, or sell.*" *Id.* at 405, 123 S.Ct. 1057 (emphasis added) (internal quotation marks omitted).

This explanation, in our view, provides the key to understanding what it means, pursuant to *Scheidler II*, to acquire property and thus to obtain it. We read the Court's

emphasis on the possibility of exercising, transferring, or selling the property as a concern with the extortionist's *intent* with respect to the property at issue. The "ultimate goal" of the anti-abortion protestors in *Scheidler II* was merely " 'shutting down' a clinic that performed abortions." *Id.* at 405, 123 S.Ct. 1057. This did not constitute acquisition in the eyes of the *Scheidler II* Court, we believe, because there was no further intended activity on the part of the protestors, and mere interference with the clinics' right to conduct their business, even to the point of getting them to cease conducting their business altogether, was closer to coercion than extortion. But had the protestors sought to take further action after having deprived the clinics of their right to conduct their business as they wished—by, for example, forcing the clinic staff to provide different types of services, forcing the clinic to turn its operations over to the protestors, or selling the clinic or its property to a third party[9]—we

9. These three examples illustrate various ways in which an extortion victim's property right might be exercised, transferred, or sold by an extortionist. In the first example, the victim is ordered to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights. In the second example, the victim is ordered to transfer his or her rights over to the extortionist so that the extortionist can simply exercise those rights himself or herself. (A closely related variant would be where the extortionist orders the victim to transfer the rights to a third party of the extortionist's choosing.) In the third example, the victim's right is sold by the extortionist to a third party of the extortionist's choosing. The precise demarcation between an exercise and a transfer may certainly be subject to debate. Because the critical question is simply whether the defendant sought to exercise, transfer, *or* sell the rights at issue, however, we are less concerned with line-drawing between those terms than with the unifying principle for the "exercise, transfer, or sale" framework: the defendant's intent to do something affirmative with respect to the property right.

believe that they would have satisfied the *Scheidler II* Court's definition of "obtaining."

Against this backdrop, it becomes clear why the Supreme Court indicated that *Tropiano* remains good law notwithstanding *Scheidler II*. The *Scheidler II* Court characterized the right at issue in *Tropiano* as "the intangible right to solicit refuse collection accounts." *Id.* at 402 n. 6, 123 S.Ct. 1057. Had the *Tropiano* defendants sought merely to get Caron to stop soliciting collection accounts because they believed that the Milford area should be entirely free from any solicitation, *Tropiano* could not stand; like the anti-abortion protestors, the *Tropiano* defendants would have been seeking simply to deprive someone of a right without doing anything affirmative with that right themselves. But unlike the anti-abortion protestors, the *Tropiano* defendants *did* seek to take action with respect to Caron's solicitation rights; they sought to transfer those rights to themselves so that they could continue their own solicitation unimpeded by competition, and thus, in a sense, broaden their own solicitation rights. In other words, the *Tropiano* defendants essentially forced Caron to give them—at no cost—a non-competition agreement, which, according to the *Tropiano* Court, was valued at about $15,000, and they used that non-competition agreement to further their own business activities. *Tropiano*, 418 F.2d at 1076. Their goal was ultimately to enrich themselves, something that could not be accomplished without appropriating to themselves the economic value of Caron's property rights. These actions, unlike those in *Scheidler II*, constituted extortion under the Hobbs Act.

Thus, we hold that in evaluating an extortion count's conformity with *Scheidler II*—*i.e.*, whether it adequately alleges the "obtaining of property" for purposes of the Hobbs Act's definition of extortion—the key inquiry is whether the defendant is (1) alleged to have carried out (or, in the case of attempted extortion, attempted to carry out) the deprivation of a property right from another, with (2) the intent to exercise, sell, transfer, or take some other analogous action with respect to that right. A motive ultimately to profit by cashing out the value of the property right will generally serve as powerful evidence that the defendant's goal was to obtain the right for himself, rather than merely to deprive the victim of that right.

We thus proceed to apply this test to each of the challenged extortion counts.

2. The Challenged Extortion Counts

On appeal, the defendants-appellants cite the following counts in the indictment as being invalidated by *Scheidler II:* the ILA-related extortion counts; the Local 1-related extortion counts; the MILA-related extortion counts; the Tommy Ragucci Counts; the Alayev Counts; and the Seagal Counts. They argue that in each of these counts, the allegations support only a charge of coercion, not extortion. Relatedly, they argue that the district court's charge as to each of these counts was inconsistent with *Scheidler II.* We therefore assess each count to determine whether it is consistent with our construction of *Scheidler II*, first looking at how each count was framed in the indictment, and then considering how the district court ultimately described each count to the jury when issuing its charge.

Appendix A

a. *The Indictment*

i. *The ILA and Local 1 Counts*

On both the ILA-related and Local 1-related extortion counts, the indictment alleged that the defendants sought to obtain, and did obtain, the union members' LMRDA rights to free speech and democratic participation in union affairs as well as their LMRDA rights to loyal representation by their officers, agents, and other representatives. It further stated that the defendants sought to exercise those rights themselves, by telling various delegates whom to vote for in certain leadership positions, and by controlling various elected officials' performance of their union duties. We believe that these allegations satisfy our interpretation of *Scheidler II*, because the government charges not only that the defendants caused the relinquishment of the union members' LMRDA rights, but also that the defendants did so in order to exercise those rights for themselves—indeed, in a way that would profit them financially.

We note that the defendants-appellants have also argued that these counts must fail because they could not *legally* exercise the union members' LMRDA rights, and therefore cannot be said to have obtained them. This argument builds upon a recent split that has emerged, post-*Scheidler II*, among various district courts in this Circuit. Three of the four district courts considering this issue—the district court in this case, *see* March 26, 2004 Sentencing Tr. 10-14, along with two other district courts—have concluded that LMRDA rights can constitute extortable property under the Hobbs Act, notwithstanding the fact that LMRDA rights cannot be legally

exercised by third parties. *See United States v. Muscarella*, 2004 WL 2186561, at * 6 (S.D.N.Y. Sept.28, 2004); *United States v. Cacace*, 2004 WL 1646760 at * 2-*3 (E.D.N.Y. July 14, 2004). One district court, however, has reached a different view, concluding in a pair of cases that intangible property rights can qualify as extortable property under the Hobbs Act, but only if they can be lawfully exercised, transferred, or sold, and that LMRDA rights therefore do not qualify. *See United States v. Bellomo*, 263 F.Supp.2d 561, 575-576 (E.D.N.Y.2003); *United States v. Coffey*, 361 F.Supp.2d 102, 108-109 (E.D.N.Y.2005).

We agree with the majority of district courts that have concluded that intangible property can qualify as extortable property under the Hobbs Act regardless of whether its exercise, transfer, or sale would be legal. The Supreme Court did not include a "legality" limitation in *Scheidler II*. Moreover, as the government points out, the *Bellomo/Coffey* approach adopted by one district court gives rise to the untenable implication that one can never "extort," under the Hobbs Act, illegal property (such as narcotics) because such property cannot be legally used, sold, or transferred. In *Bellomo*, the district court tried to distinguish this argument by stating that "[t]he victim's grievance in that hypothetical would surely not be the loss of his right to distribute drugs, but what the extortionist has obtained from him, the drugs." *Bellomo*, 263 F.Supp.2d at 576. It is, however, as illegal to possess tangible drugs as it is to exercise the intangible "right to distribute drugs." The *Bellomo* court thus seems to suggest that its "legality" gloss on *Scheidler II* only applies to intangible property. We see no basis in principle, policy, or the text of *Scheidler II*, however, for holding that tangible

property is "obtainable" regardless of whether its use, transfer, or sale is legal, but that intangible property is "obtainable" only if its exercise, transfer, or sale is legal. Nor do we see any basis for imposing a "legality" requirement on the extortion of both tangible and intangible property. Accordingly, we hold that the ILA-related and Local 1-related Hobbs Act extortion counts all survived *Scheidler II.*

ii. *The MILA Counts*

Similarly, as to the MILA-related extortion counts, the indictment alleges that the defendants sought to obtain, and did obtain, the MILA participants' and beneficiaries' rights to have the MILA trustees contract with the service provider of prescription drugs of the trustees' choice, and to have MILA trustees and fiduciaries discharge their duties in MILA's best interest. The indictment further asserts that the defendants sought to exercise these rights for themselves by telling the MILA trustees which service provider to support, and thereby ensuring the selection of a Gambino-associated enterprise (GPP/VIP) that would pay kickbacks. Here, too, the allegation is that the defendants exercised the rights in question in order to profit themselves. Thus, the MILA-related Hobbs Act extortion counts satisfy the dictates of *Scheidler II.*

iii. *The Tommy Ragucci Counts*

As to the Tommy Ragucci Counts, the relevant portion of the indictment alleges that the defendants attempted to obtain "money and the right of John Doe 1 [Tommy Ragucci] to be an employee of Howland Hook Container Terminal."

Appendix A

Indictment ¶¶ 169, 171. In its brief, the government similarly characterizes the extorted property from Tommy Ragucci as his "salary and right to be employed at Howland Hook." We note that while Tommy Ragucci was presumably an at-will employee with no guaranteed right to continued employment at Howland Hook, he surely had the right to be employed there for as long as he sought the job and his employer would have him. The defendants unquestionably sought to deprive him of that right, and of its attendant salary, when they ordered him to quit. The defendants also sought to take affirmative steps with respect to those rights of employment and salary, insofar as their ultimate goal was to transfer those rights to their own preferred candidate. Thus, for the same reason that we believe *Tropiano* survives *Scheidler II*, we conclude that the Tommy Ragucci Counts similarly survive: in both cases, the defendants tried to force their victim to relinquish a property right so that they could transfer that right either to themselves (as in *Tropiano*) or to a third party of their choice (as in the Tommy Ragucci Counts).

iv. *The Alayev Counts*

The Alayev Counts also state a claim for Hobbs Act extortion under our interpretation of *Scheidler II.* Here, in relevant part, the indictment alleges that the defendants obtained Alayev's intangible property rights to make various business decisions (such as whether to keep illegal gambling machines on the premises) free from outside pressure. As the government aptly states in its brief, "[t]he defendants did not seek merely to 'shut down' Alayev's business but essentially made themselves his silent partners and exercised his rights to their own advantage." Because here the allegation

is that the defendants sought to exercise for themselves Alayev's rights in a manner that would profit them, the Alayev Counts survive *Scheidler II.*

v. *The Seagal Counts*

Finally, the Seagal Counts also satisfy the *Scheidler II* standard. Here, it is alleged that the defendants sought to exercise for themselves Seagal's right to make his own business decisions, by threatening him with possible violence unless he worked with Jules Nasso again. Thus, here the defendants sought to exercise for themselves Seagal's intangible right to decide with whom to work, in order to secure profit for themselves. This constitutes Hobbs Act extortion under *Scheidler II.*

b. *The Jury Charge*

We similarly conclude that the jury was properly instructed as to the elements of extortion under the Hobbs Act.

The charge that the district court ultimately issued to the jury on March 5, 2003 (mere days after *Scheidler II* was decided) was, in relevant part, as follows:

> The term crime in the Hobbs Act includes not only money and other tangible things of value but also includes any intangible right considered as a source or component of income or wealth. . . .

> [Y]ou should find the defendant guilty of extortion provided the government has proven that as a consequence thereof the defendant obtained money or something else of value from the victims that the defendant could exercise and transfer or sell.
>
> In other words, merely interfering and depriving someone of property is insufficient to constitute extortion. You have to be [sic] the obtaining of money or something else of value from the victims that the defendant could exercise, transfer or sell as well.

Tr. 4836, 4839.

In addition to setting forth that definition of "obtaining," the district court also defined the relevant property implicated in each of the various extortion counts. For example, as to the ILA-related extortion counts, the district court identified the property at issue as consisting

> not only of union positions, money paid as wages and employee benefits and other economic benefits, but also certain intangible rights of ILA members that are guaranteed to them by the Labor Management Reporting Disclosure Act, which we refer to as the LMRDA. . . . The LMRDA is a federal statute that guarantees and protects the rights of employees who are members of labor organizations or unions. . . . The LMRDA guarantees the rights of union members to fully

> and freely participate in the internal affairs and governance of their union, to run for union office, if they choose, to assemble and express their views and opinions about union affairs, to support and campaign on behalf of candidates of their choice and to vote in union elections, all without being subject to retaliation, threats or other punishment in the exercise of those rights. The LMRDA also guarantees the right of union members to have their organization's money, property and financial affairs of their labor organizations managed in accordance with the loyal and responsible representation of the union's officers, agents, shop stewards and other representatives solely for the benefit of the union and its members and not on behalf of any party whose interests conflict with those of the union and its members.

Tr. 4837-38.

As to the MILA-related extortion counts, the district court identified the property at issue as including

> One, money and other economic benefits that MILA and its participants and beneficiaries would have obtained but for the defendants' corrupt influence over MILA.
>
> Two, the right of MILA and its participants and beneficiaries to have the MILA trustees contract with the service provider of prescription pharmaceuticals of the trustees' choice; and

> Three, the right of MILA and its participants and beneficiaries to have the MILA's trustees and fiduciaries discharge their duties with respect to MILA solely in the interest of MILA and its participants and beneficiaries and not on behalf of a party whose interests are adverse to the interests of MILA and its participants and beneficiaries . . . These latter rights are guaranteed by certain statutes, including the Employee Retirement Income Security Act of 1974, which we call ERISA.

Tr. 4849-51.

On the Local 1-related extortion counts, the district court stated that they implicated the same property interests as had been implicated by the ILA-related extortion counts. Tr. 4858.

As to the Tommy Ragucci Counts, the district court stated that the property at issue was "the right of Tommy Ragucci to be an employee of Howland Hook Terminal." Tr. 4892.

As to the Alayev-related extortion counts, the district court stated that the property at issue consisted of money or the right to conduct a business free from outside pressure, including the right to refuse to keep the illegal gambling machines at a business and the right to sell the business free from outside pressure. Tr. 4894.

The district court added that, in regard to the rights to refuse to keep illegal gambling machines at a business and to sell the business,

> merely interfering with or depriving someone of those property rights is insufficient to constitute extortion. More is required. Before you can find the defendant guilty of extortion under these sub parts, you must find the government has proven that as a result of wrongfully inducing the victim to part with the property right identified in those sub parts, the defendant obtained money as [*sic*] something else of value from the victim that the defendant could exercise, transfer or sell. So, in other words, it is not enough just to discourage somebody or coerce somebody from not selling his business, you have to get something because of that type of activity.

Tr. 4895-96.

Finally, as to the Seagal-related extortion counts, the district court stated that the property at issue was "money and the right to make business decisions free from outside pressure." Tr. 4897.

We believe that the district court's charge to the jury as to each of these counts was generally consistent with *Scheidler II* and with the analysis that we have set forth above. The defendants-appellants argue that the district court's charge was erroneous because, at several times during the lengthy charge, it "called . . . to mind" concepts "inconsistent with the *Scheidler* holding," such as coercion. In particular, they point out that when discussing the ILA-related counts, the district court stated that "I further instruct you that you may find that a defendant induced labor union

members to surrender property by the wrongful, actual or threatened use of force, violence or fear if the defendant threatened or coerced such members or their agents or representatives against their will in a manner that caused the members to refrain from exercising their rights under the LMRDA." Tr. 4838-39. The defendants-appellants neglect to mention, however, that in the very next sentence, the district court went on to state that "if you do so find, then you should find the defendant guilty of extortion *provided the government has proven that as a consequence thereof the defendant obtained money or something else of value from the victims that the defendant could exercise and transfer or sell.*" Tr. 4839 (emphasis added). Thus, the district court clearly and expressly tied its instruction on the ILA extortion counts back to the *Scheidler II* standard.

Similarly, the defendants-appellants point out that when charging the jury on the MILA-related extortion counts, the district court told the jurors that "if you conclude that the government has proven that a defendant used such coercion to induce a MILA trustee or another person who exercised discretionary authority or control in regard to MILA's assets in the transaction to select Vincent Nasso's firm as a service provider without regard to the interest of the plan's participants and beneficiaries, but, rather, in the interest of Vincent Nasso and others acting on his behalf, then you may find such defendant wrongfully induced the obtaining of intangible rights of the MILA participants and beneficiaries." Tr. 4854. The defendants-appellants suggest that this language "practically told the jury to find on the basis of coercion rather than obtaining property by extortion." This characterization is simply incorrect. Contrary to the

defendants-appellants' assertion, here the district court was instructing the jurors that to find that the defendants had wrongfully obtained the intangible rights of the MILA participants and beneficiaries, they had to find not only that the defendants had caused the relinquishing of these rights, but that the defendants had exercised those rights for themselves, *i.e.*, by ensuring the selection of Gambino associate Vincent Nasso's company, GPP/VIP, as a service provider. Even this excerpted portion was, therefore, entirely consistent with the *Scheidler II* standard. It is also worth noting that a mere two sentences before this MILA-specific discussion, the district court had expressly reiterated that "merely interfering with or depriving someone of property is insufficient to constitute extortion. You need the other branch of this, that the defendants obtained money or something else of value from the victims that the defendants could exercise, transfer, or sell." Tr. 4853-54.

In short, the record makes clear that the district court consistently emphasized to the jury—both as a general matter and in its discussion of the particular extortion counts—the "obtaining" requirement as set forth in *Scheidler II*. And where a jury is repeatedly and correctly instructed, in the language of the controlling Supreme Court decision, on the elements required for conviction, a defendant cannot claim prejudicial error. *See United States v. Coyne*, 4 F.3d 100, 114 (2d Cir.1993). We therefore reject all of the defendants-appellants' *Scheidler II*-based challenges to their extortion convictions.

Appendix A

B. The Defendants-Appellants' Sufficiency of the Evidence Challenges

The defendants-appellants also raise various challenges to the sufficiency of the evidence supporting their convictions of the Local 1 Counts, the Local 1814 Counts, the Howland Hook Counts, the Molfetta Counts, the Money Laundering Counts, the Tommy Ragucci Counts, the Zinna Count, the Marinelli Counts, the Alayev Counts, the Seagal Counts, the Gambling Counts, and the Witness Tampering Count. We discuss each of these challenges below. As an initial matter, we note that the same standard of review applies to all of these challenges: the defendants-appellants are subject to the "heavy burden" of demonstrating that no jury could have found guilt beyond a reasonable doubt based on the reasonably drawn inferences from the evidence, which this Court views in the light most favorable to the government. *See, e.g., United States v. Locascio*, 6 F.3d 924, 944 (2d Cir.1993). We also note that, to the extent that one defendant-appellant asserts a sufficiency-of-the evidence argument that is also relevant to the case of another defendant-appellant, we assume that the other defendant-appellant joins in that argument, given that each of them have so indicated in their submissions to this Court.

1. The Local 1 Counts [Ciccone, Bondi]

As described in detail above, the Local 1 counts rested on the argument that the defendants, including defendants-appellants Ciccone and Bondi, had attempted, schemed, and conspired to exercise control over Local 1 officials Saccenti and Knott. On appeal, both Ciccone and Bondi argue that

there was insufficient evidence to support their fraud convictions as to Local 1, and Bondi also argues that there was insufficient evidence to support his conviction for extortion of Local 1. We first analyze whether there was sufficient evidence on the Local 1 fraud counts, and then move to an assessment of the Local 1 extortion counts.

a. *The Local 1 Fraud Counts*

It is undisputed that the Local 1 fraud counts—which alleged a conspiracy and scheme to defraud Local 1—sounded in an "honest services wire fraud" theory. As this Court has previously explained, the general elements of wire fraud under 18 U.S.C. § 1343 are (1) a scheme to defraud; (2) money or property as the object of the scheme; and (3) use of the wires to further the scheme. *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir.2004). The specific type of wire fraud at issue here—"honest services wire fraud"—arises under 18 U.S.C. § 1346, which this Circuit has interpreted to "clearly prohibit [ ] a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer." *United States v. Rybicki*, 354 F.3d 124, 126-27 (2d Cir.2003) (en banc); *see also id.* at 147 (stating that a conviction requires a showing of "(1) a scheme or artifice to defraud; (2) for the purpose of depriving another of the

intangible right of honest services . . . ; (3) where the misrepresentations (or omissions) made by the defendants are material in that they have the natural tendency to influence or are capable of influencing the employer to change its behavior; and (4) use of the mails or wires in furtherance of the scheme"); 18 U.S.C. § 1346.

Here, the essence of the government's "honest services wire fraud" theory as to the Local 1 Counts was that the defendants schemed to defraud Local 1 union members of the honest services of two of their elected officials—Louis Saccenti and Steve Knott—by getting these officials to secretly act at the behest of the Gambino Family. In his appeal, Ciccone has not disputed that there was sufficient evidence demonstrating that he attempted to exercise control over the decisions of Saccenti and Knott. Rather, Ciccone argues that there is no evidence that Saccenti or Knott ever actually *acceded* to this coercion, and that the Local 1 members were therefore ultimately defrauded of nothing.

As the government points out, however, this Circuit has held that in wire fraud cases, it is the scheme itself, rather than its success, that is the required element for conviction. *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir.1997). Ciccone has responded to this argument by attempting an analogy between the instant case and this Circuit's holding in *Rybicki* (an honest services wire fraud case) that

> private-sector honest services cases fall into two general groups, cases involving bribes or kickbacks, and cases involving self-dealing. . . . In bribery or kickback cases, the undisclosed

> bribery itself is sufficient to make out the crime, but in self-dealing cases, the existence of a conflict of interest alone is not sufficient to do so. . . . In the self-dealing context, though not in the bribery context, the defendant's behavior must thus cause, or at least be capable of causing, some detriment—perhaps some economic or pecuniary detriment—to the employer.

Rybicki, 354 F.3d at 139-141. Essentially, Ciccone suggests that this case is analogous to a "self-dealing" case, and that because no detriment to Local 1 actually occurred here, no liability can attach to the scheme. This argument fails for two reasons. First, we do not believe that an analogy can properly be drawn between a self-dealing case in the private sector and the conduct alleged here, *i.e.*, attempts to coerce union officials into shifting their loyalty from their union members to organized crime. Indeed, *Rybicki* stated that "[c]ases involving union officials tend to fit the pattern of the private-sector bribery cases" (in which case no showing of detriment is required) and that in any event, "[b]ecause federal law imposes special duties of loyalty on union officials, analysis of such cases may depart from analysis of other private sector cases." *Rybicki*, 354 F.3d at 140 & n. 14. Second, even assuming *arguendo* that this analogy could somehow stand, it is clear that the defendants' commission of this conduct was at least *capable* of causing some detriment (economic and otherwise) to the Local 1 members, which is all that *Rybicki* requires. We therefore reject Ciccone's challenge to the sufficiency of the evidence supporting his conviction of the Local 1 fraud counts.

Bondi, meanwhile, raises an additional challenge: he alleges that there was no evidence that he personally ever had any contact with Local 1 official Louis Saccenti, and that he simply happened to be present—by coincidence—when Cassarino visited Saccenti's house with the purpose of telling Saccenti to stop his resistance. Construing the facts in the light most favorable to the government, however, we believe that there was sufficient evidence to conclude that when, after Ciccone instructed Cassarino to take Bondi with him to tell Saccenti that he "better stop it . . . otherwise, you know what's going to happen here?" and Bondi proceeded to accompany Cassarino to Saccenti's home, *see supra* p. 307, Bondi did so as a participant in the criminal scheme. *See, e.g.*, *Locascio*, 6 F.3d at 944 (stating that although "[t]raditionally, conspiracy law has required more than 'mere presence' or mere knowledge to sustain a conviction for conspiracy[.] . . . [t]here is a distinction between 'mere presence' and 'presence under a particular set of circumstances' that indicate participation," and that "presence coupled with other signs of involvement will be enough to sustain a conviction"). We therefore reject Bondi's challenge to the sufficiency of the evidence supporting his conviction of the Local 1 fraud counts.

b. *The Local 1 Extortion Counts*

Bondi challenges his conviction of the Local 1 extortion counts on the same basis that he challenged his conviction of the Local 1 fraud counts: he suggests that it was mere coincidence that he was present when Cassarino went over to Saccenti's house in order to tell him to stop his resistance. For the reasons set forth above, we reject this argument and thus affirm his conviction of these counts.

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2. The Local 1814 Counts [Ciccone]

The Local 1814 counts, as described in detail above, rested on the theory that Ciccone and other defendants had exercised control over the actions of Local 1814 President Scollo, thereby extorting and defrauding Local 1814 and its members. In his brief, Ciccone does not dispute that he exercised control over Scollo, but argues that Scollo's ultimate actions were consistent with the interests of Local 1814. He points out, for instance, that Scollo testified that he himself wanted to terminate Scala, and that Ciccone permitted him to do so.

As the government argues, however, the harm caused to Local 1814 was that Scollo generally had to seek Ciccone's permission before taking any significant action, and that the Local 1814 members were therefore deprived of Scollo's honest services. We agree. The Local 1814 members had the right to have Scollo—their elected representative—independently make the decisions that he wanted to make, according to the timetable that he thought appropriate. Because of Ciccone's control over Scollo, this was not possible. For instance, during the trial, when Scollo was asked whether he had felt that he had the authority to terminate Phil Scala, he answered "not really." Tr. 1449. He explained that he had to wait until "Sonny" [Ciccone] said "if you want to get rid of him, get rid of him," because "Sonny always told us when it's the big decisions that we should have to confer with him first." Tr. 1450. By ordering Scollo to "confer with him" on the "big decisions," Ciccone defrauded the Local 1814 members of Scollo's honest services. That Ciccone often ultimately permitted Scollo to

follow through on his proposed course of action is irrelevant. We therefore reject Ciccone's challenge to his conviction of the Local 1814 counts.

3. The Howland Hook Counts

As set forth in detail above, the gravamen of the Howland Hook Counts was that Ciccone, along with other defendants, had extorted quarterly cash payments from Carmine Ragucci, the then-owner of Howland Hook, for a period of multiple years. On appeal, Ciccone apparently concedes that these cash payments were made, but states that there was insufficient evidence as to what these payments were for or why they were made, stressing that Carmine Ragucci himself never testified.

As discussed above, extortion is defined in the Hobbs Act as "the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence, or *fear*." 18 U.S.C. § 1951(b)(2) (emphasis added). This Circuit has stated that "[t]he statute does not limit the definition of extortion to those circumstances in which property is obtained through the wrongful use of fear created by implicit or explicit threats, but instead leaves open the cause of the fear," and we have indicated that the required showing is that the "defendant must knowingly and willfully create or instill fear, or use or exploit existing fear with the specific purpose of inducing another to part with his or her property." *United States v. Abelis*, 146 F.3d 73, 83 (2d Cir.1998) (internal quotation marks omitted).

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Here, we believe that given the evidence described above, a reasonable jury could have concluded that Ciccone obtained these cash payments from Carmine Ragucci by exploiting Ragucci's fear of Ciccone, particularly given Scollo's testimony that Ciccone would be "pissed off" when the payments were late, and that Scollo would then communicate that displeasure to Ragucci. It is true that Ragucci did not himself testify, but there is no dispute that Ragucci made sizeable cash payments to Ciccone on a scheduled basis, no dispute that Ragucci would be told that Ciccone was "pissed off" when the payments were late, and no affirmative evidence whatsoever that these payments were for a legitimate purpose, such as repayment of a loan or payment for services rendered. Indeed, Ragucci's brother, Tommy—who worked with him at Howland Hook—specifically testified that he did not know of any legitimate basis for these payments. Scollo's testimony about the highly surreptitious nature of the transmission of the money, and the fact that he knew his involvement in it was "not the proper thing to do," further supports the conclusion that these payments were the result of extortion. Although Ciccone has posited on appeal various other reasons for why these payments were made, no evidence supporting such reasons was presented to the jury, and we cannot say that, construing all facts in the light most favorable to the government, a reasonable jury would have been unable to conclude that these payments were the result of extortion. We therefore reject Ciccone's challenge to his conviction of the Howland Hook Counts.

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4. The Molfetta Counts

The Molfetta Counts, in turn, rested on the theory that Ciccone had extorted cash payments from Frank Molfetta, the owner of the Bridgeside Drayadge trucking company. In his brief, Ciccone acknowledges receiving cash payments from Molfetta, but argues that he "liberated Molfetta from [the] obligation" to pay Carmine Ragucci and that this was therefore not a case of extortion. This argument fails to persuade us that a reasonable jury could not have concluded that the payments were the result of extortion, for two reasons. First, Ciccone has never addressed the uncontradicted evidence that Molfetta had already concluded at least three years earlier that he was no longer obligated to pay Carmine Ragucci. This evidence, of course, seriously undermines Ciccone's claim that he somehow freed Molfetta from that obligation. Second, in his grand jury testimony, Molfetta himself stated that Ciccone had ordered him to start making monthly payments (retroactive to the prior month), and that he had made those payments out of fear, adding, "I'm afraid right now." *See supra* p. **308.** Ciccone acknowledges the admissibility of Molfetta's grand jury testimony as a prior inconsistent statement, but states that "even crediting this, there was no proof that Ciccone affirmatively exploited any such fear." In so arguing, Ciccone fails to confront the actual substance of Molfetta's testimony, which certainly provided sufficient evidence upon which a jury could conclude that he made the payments in question out of fear. We therefore reject Ciccone's challenge to the sufficiency of the evidence supporting his conviction of the Molfetta Counts.

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5. The Money Laundering Counts
[Peter Gotti, Richard G. Gotti, Ciccone]

Peter Gotti, Richard G. Gotti, and Ciccone were convicted of (1) money laundering conspiracy in violation of 18 U.S.C. § 1956(h) and (2) numerous acts of money laundering in violation of either 18 U.S.C. § 1956(a)(1)(A)(i) ("promotion money laundering") and 18 U.S.C. § 1956(a)(1)(B)(i) ("concealment money laundering"). As set forth in detail above, the money laundering charges essentially implicated the payment of cash "tributes" from the proceeds of illegal activities up the Gambino Family chain to Peter Gotti, as acting boss. (Ciccone, as described *supra*, both received moneys and paid a portion of those moneys up the chain to Peter Gotti.)

On appeal, the defendants-appellants make several arguments stemming from the statutory text of 18 U.S.C. § 1956.[10] We therefore begin with the relevant statutory language, which provides that

> (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

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10. These arguments can be found in the briefs of both Peter Gotti and Ciccone. We assume that each joins in the other's arguments as relevant, and that Richard G. Gotti (who did not submit a separate brief) joins in all arguments relevant to him. We therefore refer to these arguments as being advanced by the "defendants-appellants," regardless of in whose brief they can be found.

> (A) (i) with the intent to promote the carrying on of specified unlawful activity; or . . .
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a). The money laundering conspiracy provision, in turn, simply makes it a crime to conspire to commit the above acts. *See* 18 U.S.C. § 1956(h) ("Any person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.").

Thus, the money laundering charges against Peter Gotti, Richard G. Gotti, and Ciccone required the government to prove that the defendants, (1) knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, (2) conducted or attempted to conduct a financial transaction (3) which in fact involved

the proceeds of that unlawful activity, (4) either (a) with the intent to promote the carrying on of that unlawful activity or (b) with the knowledge that the transaction was designed at least in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity.

The defendants-appellants argue that prongs two, three, and four were not met. We address each of these arguments in turn.

a. *Prong 2: Conducting a Financial Transaction*

To evaluate the contention that there was insufficient evidence to show that the defendants-appellants conducted a financial transaction, we must first look to the statutory definitions of "conduct," "transaction," and "financial transaction."

Under 18 U.S.C. § 1956(c)(2), the term "conducts" is defined as "includ[ing] initiating, concluding, or participating in initiating, or concluding a transaction."

Under 18 U.S.C. § 1956(c)(3), the term "transaction" is defined as including

> a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit

> box, or any other payment, transfer, or delivery, by, through, or to a financial institution, by whatever means effected.

Finally, under 18 U.S.C. § 1956(c)(4), a "financial transaction" is defined as:

> (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

The defendants-appellants advance two arguments as to why the "conducting a financial transaction" prong was not met, both of which are primarily legal in nature. First, they argue that there was insufficient evidence to conclude that they conducted any transactions. Second, they argue that there was insufficient evidence to conclude that the alleged transactions they conducted were *financial*, *i.e.*, that the transactions "in any way or degree affect[ed] interstate or foreign commerce."

The defendants-appellants' first argument, advanced principally by Peter Gotti, is that at most, the government demonstrated the *receipt* of moneys, and that merely receiving funds cannot rise to the level of conducting a

transaction. The statutory text, however, indicates the mere receipt of funds *does* constitute the conducting of a transaction pursuant to 18 U.S.C. § 1956(c)(2)-(3), under which (1) the term "conducts" includes participating in the conclusion of a transaction and (2) the term "transaction" includes transfers and deliveries. In other words, when a person accepts a transfer or delivery of funds, he has participated in the conclusion of that transfer or delivery, and has therefore conducted a transaction. This interpretation is also consistent with the indication in the legislative history that Congress intended the term "transaction" to be interpreted broadly. *See, e.g., United States v. Leslie*, 103 F.3d 1093, 1101-02 (2d Cir.1997) (noting, with reference to the Senate Report, that "Congress intended the term 'transaction' to be interpreted broadly"). Indeed, the Sixth Circuit, sitting *en banc*, has specifically concluded that the delivery or transfer of cash to another person is a financial transaction, explaining that although the "mere transportation of cash" does not meet the definition of a financial transaction, the "purchase, sale, transfer, delivery, etc." of cash do qualify as transactions, because they constitute "some disposition of funds." *See United States v. Reed*, 77 F.3d 139, 142-43 (6th Cir.1996) (en banc). We agree, and therefore reject the defendants-appellants' argument that the receipt of funds does not constitute a transaction.

We similarly reject the defendants-appellants' second argument: that the transactions in question were not "financial" because they did not affect interstate or foreign commerce. Our Circuit has stated that in the context of money laundering prosecutions under 18 U.S.C. § 1956, the only required showing is that "the individual subject transaction

has, at least, a *de minimis* effect on interstate commerce." *Leslie*, 103 F.3d at 1100. We have explained that

> [t]he interstate commerce element of the money laundering statute, while an essential element, is jurisdictional in nature. The requirement that the transaction or financial institution affect interstate commerce means that *proof of a minimal effect* on interstate commerce is needed to support federal jurisdiction. The statute's requirement that the questioned activity 'affect commerce' in 'any way or degree' signals Congress's desire to exercise the full extent of its Commerce Clause power. Hence, the government's burden is not heavy.

Id. at 1101 (internal citations and quotation marks omitted) (emphasis added). Although the defendants-appellants argue that the mere receipt of moneys cannot affect interstate commerce, and that it is inappropriate to look at the conduct that gave rise to the money in the first place, we have held, since *Leslie*, that it is indeed permissible to consider the conduct that gave rise to the laundered funds. *See, e.g., United States v. Goodwin*, 141 F.3d 394, 402 (2d Cir.1997) (stating that laundering of narcotics proceeds met the jurisdictional requirement because "narcotics trafficking and money laundering are activities which, in the aggregate, will undoubtedly affect interstate commerce") (internal citations omitted); *see also United States v. Hatcher*, 323 F.3d 666, 672 (8th Cir.2003) (holding that the money laundering counts were linked to interstate commerce because they stemmed from a purchase of stolen jewelry, and the robbery of that jewelry had affected interstate commerce).

This interpretation, in turn, makes clear that the money laundering offenses charged in this case affected both interstate and foreign commerce. The moneys in question were alleged to be the proceeds of the Hobbs Act extortions and other illegal activities discussed in detail above. The alleged extortion victims were businesses and unions that engaged in interstate commerce, and the gambling operations (in which the defendants allegedly operated the New York branch of a Costa Rican bookmaking enterprise) were international in scope. As such, these criminal activities affected interstate and foreign commerce, and the laundering of their proceeds also affected interstate commerce by promoting the activities that gave rise to them. Moreover, as the government also notes, the alleged money laundering activity (which resulted in the payment of "tributes" up to Gambino Family leaders such as Gotti and Ciccone) also affected interstate commerce insofar as it promoted the Gambino Family's operation—which clearly affects interstate commerce—as a whole.

We believe that these factors collectively demonstrate that the money laundering had at least the minimal effect on interstate commerce necessary to satisfy the jurisdictional requirement, and we therefore reject the defendants-appellants' argument that there was insufficient evidence to find that they conducted financial transactions within the meaning of 18 U.S.C. § 1956.

b. *Prong 3: Proceeds of Unlawful Activity*

The defendants-appellants next argue that even assuming *arguendo* that the receipt of the moneys in question constituted a financial transaction, there was insufficient evidence to conclude that these moneys represented the proceeds of a specified unlawful activity. In contrast to the essentially legal nature of the prong two analysis, the defendants-appellants' argument as to this prong requires a more fact-specific inquiry.

The gravamen of the defendants-appellants' contentions here is that the government did not sufficiently link the moneys in question to specified unlawful activities, but simply argued that the proceeds came from various possible unlawful sources. Under our Circuit's precedent, the government is required to link the moneys in question to specified unlawful activities, but this link can be made through circumstantial evidence. *See United States v. Reiss*, 186 F.3d 149, 152-153 (2d Cir.1999) (concluding that various pieces of evidence gave rise to the inference that the laundered funds in question were drug proceeds).

Here, we conclude that the government adduced evidence sufficient to prove that the moneys in question derived from Hobbs Act extortions and illegal gambling businesses. Indeed, as set forth in detail above, the government presented evidence indicating that these moneys came from, *inter alia*, the Molfetta extortion, the MILA kickbacks, and the joker-poker machines that the Gambino Family placed in businesses including Café Roma. *See supra* pp. 310-311.

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c. *Prong 4: Intent of Promoting or Concealing the Unlawful Activity*

Finally, the defendants-appellants argue that at most, the government has shown that cash payments were made up to Peter Gotti, and that even if it could be shown that this money derived from unlawful activities, his receipt of the money was separate from, and neither promoted nor concealed, those activities. As noted above, either the promotion or the concealment prong is a required element of a money laundering conviction.

Based on our review of the trial evidence, we believe that there was ample evidence upon which a jury could conclude that the defendants-appellants participated in concealment money laundering, *i.e.*, that they participated in a transaction (delivery of the cash) that was designed at least in part to conceal the source of these moneys. As noted above, at trial the government adduced evidence that the process by which the cash tributes were transmitted was highly complex and surreptitious. For example, the defendants would communicate about the transactions in coded language (*i.e.*, by referring to Peter Gotti as "him" or "the guy" rather than by name); the money would be transmitted to Peter Gotti through several intermediaries; the money would be transmitted in a surreptitious manner; and the payments were made in cash. *See supra* pp. 310-312. We therefore believe that a reasonable jury could infer that Peter Gotti accepted the cash payments knowing that the deliveries of those payments had been designed in a way that would

conceal the source of the moneys.[11] *See, e.g., United States v. Prince*, 214 F.3d 740, 752 (6th Cir.2000) (finding the concealment prong met by the elaborate arrangements for transmitting the money in question, which protected the defendants from a paper trail); *United States v. Cruzado-Laureano*, 404 F.3d 470, 483 (1st Cir.2005) (stating that a conviction of concealment money laundering requires "evidence of intent to disguise or conceal the transaction, whether from direct evidence, like the defendant's own statements, or from *circumstantial evidence*, like the use of a third party to disguise the true owner, or *unusual secrecy* ") (emphasis added).

6. The Tommy Ragucci Counts [Ciccone]

Ciccone next challenges his conviction of the Tommy Ragucci Counts, which—as described above—rest on the allegation that Ciccone conspired and attempted to force Tommy Ragucci to resign from his job at Howland Hook, and thus to obtain the value of his right to compete for that job. In challenging the sufficiency of the evidence supporting these convictions, Ciccone argues that "[n]o evidence of any threat communicated to [Tommy] Ragucci was elicited," that at worst, Ciccone simply "made a determination or recommendation that [Tommy] Ragucci should be replaced by Anastasia," and that there is no evidence "of any affirmative exploitation of [Tommy] Ragucci's fear [of Ciccone] much less that Ciccone was aware of it."

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11. Because only the concealment *or* the promotion prong must be met, we do not reach the separate question of whether the jury could have also concluded that Peter Gotti, Richard G. Gotti, and Ciccone engaged in "promotion money laundering."

These arguments, however, are directly contradicted by the wiretapped conversation between Ciccone and Scollo as to Tommy Ragucci, in which Ciccone instructed Scollo: "Tell him I don't want him there. Tell him I don't want him there." *See supra* p. 312. They are also squarely contradicted by Tommy Ragucci's own testimony that Scollo told him that Ciccone wanted him to step down, which caused him to feel intimidated. *See id.* We therefore believe that there was ample evidence upon which a jury could conclude that Ciccone attempted to extort the economic value of Tommy Ragucci's right to compete for his position at Howland Hook.

7. The Zinna Count [Ciccone]

The Zinna Count, as set forth above, rests on the allegation that Ciccone schemed with other defendants to demand $5,000 in cash from Zinna. In challenging the sufficiency of the evidence supporting his conviction on this count, Ciccone principally argues that there is no proof that Zinna was ever actually asked for this money. This argument fails to appreciate that the Zinna Count did not charge Ciccone with extortion itself, but with *conspiracy* to extort. The evidence described above is certainly sufficient to support a fact-finder's conclusion that Ciccone schemed with Cassarino and Scollo to extort property from Zinna, in violation of the Hobbs Act. *See supra* p. 313; *see also United States v. Clemente*, 22 F.3d 477, 480 (2d Cir.1994) ("In order to establish a Hobbs Act conspiracy, the government does not have to prove any overt act. . . . The government needs to prove only that an agreement to commit extortion existed, not that extortion was actually committed."). Ciccone also argues that there is no evidence that Scollo and Cassarino

actually agreed to carry out his orders to extort the money from Zinna. In the conversation between Ciccone, Scollo, and Cassarino, however, the three men discussed Zinna's activities with shared disapproval, and expressed no hesitation about carrying out Ciccone's orders to extort him. We therefore reject Ciccone's challenges to this conviction.

8. The Marinelli Counts [Ciccone]

The gravamen of the Marinelli Counts, as described above, was that after Marinelli enlisted the help of Ciccone and Cassarino in obtaining his workers' compensation payments, they extorted a portion of the proceeds from him. In challenging the sufficiency of the evidence supporting his conviction of these counts, Ciccone argues that there was no evidence that Marinelli paid Ciccone and Cassarino out of fear, noting that Marinelli was the one who initially contacted Ciccone and Cassarino for the help in question. This argument does not respond, however, to the evidence that once Marinelli *did* contact Ciccone and Cassarino (and later received his payment), Ciccone and Cassarino demanded a portion of the proceeds and then instructed Marinelli's son, Vito, that the initial $5,000 payment was insufficient. *See supra* p. 314. It seems clear that a reasonable factfinder could conclude that at this point, Marinelli's decision to pay them another $5,000 was prompted by fear. Indeed, Marinelli's son, Vito, specifically testified at trial about his fear of not paying enough. *See id.* We therefore reject Ciccone's argument that there was insufficient evidence supporting his conviction of this count.

Appendix A

9. The Alayev Counts [Bondi][12]

The only sufficiency-of-the-evidence challenge to the Alayev Counts has been brought by Bondi, who argues that he was not personally involved in the Eduard Alayev extortion. At trial, however, the government adduced evidence sufficient to tie Bondi to the extortion. Specifically, as noted above, Alayev testified that both Cassarino and Bondi came together to order him to install gambling machines at Café Roma. *See supra* p. 313. The government also introduced wiretap evidence in which Bondi provided Cassarino with information about Alayev (whom they referred to as "Eddie") and the goings-on at Café Roma. *See supra* p. 314. Alayev also testified at trial that Bondi was the person who would come to collect the money from the gambling machines, and would sometimes give him some of the proceeds. *See supra* p. 314. Based on the above, we conclude that there was sufficient evidence for the jury to tie Bondi to the Alayev extortion.

10. The Seagal Counts [Ciccone]

Ciccone next challenges the sufficiency of the evidence supporting his conviction of the Seagal Counts, which essentially alleged that he had attempted to force Seagal to work with Jules Nasso. On appeal, Ciccone acknowledges that Seagal was subjected to fear by other Gambino Family

12. Although Ciccone was also convicted of the Alayev counts, he has not challenged on appeal the sufficiency of the evidence supporting these counts. Since all of Bondi's arguments as to the Alayev Counts are specific to him, we assume that Ciccone does not join in them.

associates, but asserts that he had no involvement in these interactions. The evidence adduced at trial, however, plainly supported a finding that Ciccone himself was involved in exploiting Seagal's fear of him in order to get him to work with Jules Nasso. Indeed, Seagal testified to numerous instances in which Ciccone interacted with him in a threatening manner while telling him to resume his business relationship with Jules Nasso and to pay the defendants significant sums of money. *See supra* pp. 315-316. The wiretap evidence also indicated that Ciccone was directly involved in the pressure brought to bear on Seagal. *See supra* p. 316. Accordingly, we reject this challenge.

11. The Gambling Counts [Bondi][13]

Bondi (presumably joined by Ciccone) next argues that there was insufficient evidence to support his gambling convictions for bookmaking and joker-poker under 18 U.S.C. § 1955. This statute provides that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an *illegal gambling business* shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1955(a) (emphasis added). An "illegal gambling business," in turn, is defined as one which

> (i) is a violation of the law of a State . . . in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct,

13. In his brief, Ciccone did not raise specific arguments as to the Gambling Counts, of which he was also convicted. We assume, however, that he joins in the arguments advanced by Bondi, because they are generally applicable rather than specific to Bondi.

> or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. § 1955(b)(1).

Bondi argues that his convictions for bookmaking and joker-poker did not satisfy these statutory requirements.

a. *Bookmaking*

With regard to the bookmaking count, Bondi essentially makes three arguments as to why there was insufficient evidence to convict him of bookmaking. His first two arguments arise from the 18 U.S.C. § 1955(b)(1)(i) requirement that the business must violate the law of the State in which it was conducted. His third argument arises from the 18 U.S.C. § 1955(b)(1)(ii) requirement that the business involve five or more persons who conduct, finance, manage, supervise, direct, or own all or part of the business.

First, Bondi asserts that the bookmaking business was not a violation of New York law (and therefore did not satisfy the requirements of 18 U.S.C. § 1955(b)(1)(i)) because Pelican Sports was located offshore in Costa Rica, its actions were legal there, and no bets were received or accepted in New York. At trial, however, the government adduced evidence sufficient to conclude that the defendants, who were New York-based, had been operating a local branch of the business, essentially managing a stable of clients who placed their bets from New York. *See supra* pp. 317-318. When bets

are placed from New York, the gambling activity is illegal under New York law, regardless of whether the activity is legal in the location to which the bets were transmitted. *See, e.g., People ex rel. Vacco v. World Interactive Gaming Corp.*, 185 Misc.2d 852, 859-60, 714 N.Y.S.2d 844 (N.Y.Sup.1999) ("[U]nder New York Penal Law, if the person engaged in gambling is located in New York, then New York is the location where the gambling occurred (*see* Penal Law § 225.00(2))[14]. . . . It is irrelevant that Internet gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within New York State."). New York Penal Law § 225.00(4) further provides that "[a] person 'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity," which the defendants here did. Thus, the defendants violated New York law by organizing a bookmaking operation through which bettors made their bets from New York.

Second, Bondi argues that the bookmaking business was not a violation of New York state law because there was no evidence that the bookmaking business accepted bets in any one day that totaled more than $5,000. *See* N.Y. Penal Law § 225.10 ("A person is guilty of promoting gambling in the first degree when he knowingly advances or profits from

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14. N.Y. Penal Law § 225.00(2) defines "gambling" as follows: "A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome."

unlawful gambling activity by (1) engaging in bookmaking activity to the extent that he receives or accepts in any one day more than five bets totaling more than five thousand dollars. . . ."). The betting records introduced into evidence at trial, however, indicated that the defendants' New York operation of Pelican Sports did take in more than five bets totaling more than $5,000 on certain days. *See, e.g.*, Gov't Exh. 65.

Third, Bondi argues that the government did not satisfy the § 1955(b)(2) standard of showing that at least five people were involved in the defendants' operation. At trial, however, the government adduced evidence that in addition to Bondi, co-defendants Ciccone, Cassarino, Brancato, Thomas Lisi, Jerome Orsino, and Carmine Malara were also involved in the bookmaking operation.[15] Thus, Bondi's arguments as to the sufficiency of the evidence on the bookmaking charges lack merit.

b. *Joker-Poker*

Bondi also asserts that the elements of 18 U.S.C. § 1955 were not satisfied with respect to the joker-poker charges, principally on grounds that the joker-poker machines in question were not illegal gambling devices.

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15. Malara and Lisi pled guilty, and their pleas were admitted into evidence. Under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which was decided after the trial, that admission was improper. At trial, however, the government also adduced overwhelming factual evidence that at least five defendants—Ciccone, Casarino, Bondi, Orsino, and Brancato—were involved in the bookmaking business, and also adduced independent evidence as to the involvement of Malara and Lisi. *See supra* pp. 317-318; *see infra* pp. 345-346.

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As noted above, 18 U.S.C. § 1955 makes illegal only those gambling businesses that are a violation of the law of the state in which they are conducted. Under New York State law, an illegal gambling device is a machine usable in the playing phases of any "gambling activity." N.Y. Penal Law § 225.00(7). "Gambling," in turn, is defined as the staking or risking of " *something of value* upon the outcome of a *contest of chance* . . . , upon an agreement or understanding that [the individual] will receive something of value in the event of a certain outcome." N.Y. Penal Law § 225.00(2) (emphasis added). "Something of value" is defined as "any money or property, any token, object, or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein." N.Y. Penal Law § 225.00(6). A "contest of chance" is defined as a "game . . . in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein." N.Y. Penal Law § 225.00(1). Thus, in sum, an illegal gambling device is a machine that is used in an activity where money (or something else of value) is staked upon the outcome of a contest that depends in a material degree upon chance.

On appeal, Bondi raises several arguments as to why the government failed to adduce sufficient evidence that the joker-poker machines in question were illegal gambling devices. First, he contends that there was no evidence that people who played the machines actually received something of value from them. Second, he argues that the games in question were games of skill rather than contests of chance. Both of these arguments lack merit. As to Bondi's "something

of value" argument, the government adduced evidence that customers of the machines in question would purchase credits to play the machines, that they would receive credits if they won, and that they could ultimately redeem these credits for cash. *See supra* pp. 318-319. Thus, there is no question that the customers risked something of value—money—upon the outcome of the games played on the machines. As to Bondi's argument that the games were games of skill rather than chance, he fails to recognize that a "contest of chance" encompasses games in which the skill of the contestants may play a role, as long as the outcome depends in a material degree on chance. Bondi concedes that the games in question had the theme of poker, and he has not contended in his brief that chance does not play a material role in the outcome of a poker game.

Bondi also argues that there was no proof that the games in question were in fact joker-poker games, pointing to the testimony of the government's expert witness, Detective Martin, that he had not seen any "pure" joker-poker machines. This argument, however, misconstrues Detective Martin's testimony. Detective Martin consistently referred to "joker-poker type machines" as an umbrella term encompassing different types of illegal gambling machines. *See, e.g.*, Tr. 3557-58. In the statement at issue, he was simply clarifying that he had not seen any of the subset of joker-poker machines that involve playing poker with actual cards displayed on the machine's screen (called "pure" joker-poker machines). Tr. 3569-70 (Q. "There are no pure Joker-Poker machines that you have seen in this entire case, correct?" A. "Card machines, no, but clearly machines, like Lucky Eight Lines.")

Finally, Bondi suggests that the indictment's gambling count referring to joker-poker [Count 66] should have been dismissed because that count incorrectly referred to New York Penal Law § 225.10 (which was relevant to the bookmaking charge), rather than New York Penal Law § 225.30 or § 225.05. Bondi previously raised this argument to the district court, which rejected it on grounds that under *United States v. Eucker*, 532 F.2d 249, 257 (2d Cir.1976), "if an indictment properly charges an offense, it is sufficient, even though an inapposite statute is referred to therein." We agree with the district court's resolution of that issue. *See also* Fed.R.Crim.P. 7(c)(3) ("Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.").

12. The Witness Tampering Count [Ciccone]

The final sufficiency-of-the evidence challenge is brought by Ciccone on the Witness Tampering Count involving Anthony Frazetta (Bondi's stepson). This count arose under 18 U.S.C. § 1512(b), the witness tampering provision of the federal Obstruction of Justice Act, 18 U.S.C. § 1501 *et seq.* Pursuant to 18 U.S.C. § 1512(b), it is unlawful to knowingly "intimidat[e], threaten[ ], or *corruptly persuade* [ ] another person, with intent to . . . prevent the testimony of any person in an official proceeding" (emphasis added). This Circuit has defined "corrupt persuasion" as persuasion that is "motivated by an improper purpose." *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir.1996). We have also specifically stated that the Obstruction of Justice Act can be violated by corruptly influencing a witness to invoke the Fifth

Amendment privilege in his grand jury testimony. *See United States v. Cioffi*, 493 F.2d 1111, 1118 (2d Cir.1974).

In his brief, Ciccone argues that he was merely suggesting that Frazetta, who had every right to invoke the Fifth Amendment privilege, do so, and argues that this suggestion was not motivated by an improper purpose. We believe, however, that there was sufficient evidence upon which a jury could conclude that Ciccone indeed had an improper purpose in "suggesting" to Frazetta (via a command to his stepfather, Bondi, over whom he had authority under the hierarchical structure of the Gambino Family) to plead the Fifth Amendment: Ciccone wanted to ensure that Frazetta did not implicate him. *See supra* pp. 318-319. We therefore reject Ciccone's challenge to his conviction on this count.

C. The Defendants' Other Challenges

The defendants-appellants also raise several other challenges to their convictions, all of which we reject.

1. The *Crawford* Error

Defendant-appellant Bondi argues that the admission of guilty pleas by co-defendants Malara and Lisi as to the bookmaking counts violated *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), therefore mandating reversal of his convictions on those counts.

It is undisputed that under *Crawford*, which was decided one year after this trial, the admission of these guilty pleas—which were admitted for the purpose of showing that the

bookmaking business employed five or more people, a required element for conviction under 18 U.S.C. § 1955(b)(1)—was error. This Court has explained, however, that *Crawford* errors should be reviewed under a "harmless error" standard. *See, e.g., United States v. McClain*, 377 F.3d 219, 222 (2d Cir.2004) ("The erroneous admission of the three plea allocutions is therefore reviewable for harmless error, and does not necessitate a new trial as long as the government can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.") (internal quotation marks and citation omitted). In this case, we believe that the admission of Malara's and Lisi's guilty pleas was harmless. Even absent any evidence as to Malara and Lisi, there was overwhelming evidence at trial that five other defendants—Bondi, Ciccone, Cassarino, Orsino, and Brancato—were involved in the bookmaking business. *See supra* pp. 317-318. (Additionally, there was also independent evidence adduced by the government as to the involvement of Malara and Lisi. *See id.*)

The existence of this other evidence as to the involvement of at least five people in the bookmaking business renders the *Crawford* error harmless. Accordingly, we reject this challenge.

2. The Wiretap Challenge

The next argument brought by Bondi (and, presumably, joined in by the other defendants-appellants) is that the district court erred in denying a motion to suppress the products of a wiretap on co-defendant Cassarino's cellular

phone.[16] The warrant for this wiretap was originally authorized by Justice Nancy Smith of the New York Supreme Court, Appellate Division, Second Department, on April 5, 2000. Justice Smith concluded, based primarily upon the affidavit of Joseph Rauchet, Deputy Chief Investigator for the New York State Attorney General's Task Force on Organized Crime ("OCTF"), that there was probable cause to believe that Cassarino and others were "committing and are about to commit the crimes of Promoting Gambling, Possession of Gambling Records and Conspiracy to commit those crimes . . . and that evidence of these crimes may be obtained by the interception and recording of . . . communications" on Cassarino's cell phone.

Before trial, Cassarino moved to suppress the fruits of this wiretap. The district court denied that motion on December 18, 2002, concluding that probable cause supported the wiretap and that even assuming that probable cause had been absent, the agents enforcing the warrant relied in good faith upon it. This Court reviews that determination *de novo*. *See, e.g.*, *United States v. Smith*, 9 F.3d 1007, 1011 (2d Cir.1993) ("On an appeal from a ruling on a motion to suppress, we review a district court's findings of historical fact for clear error, but analyze *de novo* the ultimate determination of such legal issues as probable cause and the good faith of police officials in relying upon a warrant.").

Here, we agree with the district court that probable cause supported the issuance of the warrant for the wiretap. As noted above, the initial application for the wiretap was based

16. Bondi raises this claim as an "aggrieved person" pursuant to 18 U.S.C. § 2518(10)(a).

upon Rauchet's lengthy and detailed affidavit. Rauchet set forth four categories of information supporting a wiretap of Cassarino's cell phone: (1) surveillance evidence; (2) analysis of telephone toll records supplied by Sprint on the Cassarino cell phone; (3) Cassarino's use of false subscriber information on his cell phone; and (4) Rauchet's own opinions, based on his experience of over fifteen years investigating organized crime and gambling.

First, in terms of surveillance evidence, Rauchet described numerous instances of meetings between Cassarino and high-level Gambino Family members, such as Louie Vallario (an alleged "capo" in the Gambino Family), Brancato, and Ciccone. In fact, in one conversation overheard by an OCTF Special Investigator, Cassarino and Brancato allegedly discussed football gambling, that one location was making "barrels of money," and that off-shore gambling locations "could not be touched." Second, in analyzing Cassarino's Sprint records, Rauchet described numerous calls between Cassarino's cell phone and various high-level Gambino Family officials. Third, Rauchet noted that Cassarino's cell phone number was listed to "Cassarino Prime" rather than Primo Cassarino, that it was linked to the contact address for Jerry's Café (an alleged meeting place for the Gambino Family) rather than Cassarino's home address, and that the Social Security number associated with the cell phone was off by one digit. Rauchet stated that "[i]n my experience, those who utilize telephones to engage in illegal activities often attempt to disguise their identities." Fourth, based on his lengthy experience, Rauchet set forth his opinions about the nature of the Gambino Family's gambling enterprises, and specifically opined that Ciccone

(who, as a Gambino captain, had a higher profile) had used Cassarino "to carry messages to and set up meetings with other members of the Gambino Crime Family in order to guide and perpetuate gambling enterprises."

Based on the above, we conclude that under the federal "totality of the circumstances" standard, there was probable cause to conclude that Cassarino was engaged in criminal activity. *See United States v. Rowell*, 903 F.2d 899, 902 (2d Cir.1990) (holding that the relevant standard for federal courts on motions to suppress evidence obtained under a state-issued wiretap warrant is whether "the totality of the circumstances indicate a probability of criminal activity"). It is true that, as Bondi argues, Rauchet's affidavit included an incorrect statement: namely, that Cassarino had been convicted of a Hobbs Act violation, when in fact Cassarino had only been *arrested* for a Hobbs Act violation. (According to the government, this error occurred because a detective misread Cassarino's rap sheet to Rauchet over the telephone.) As the district court noted, however, even without this misstatement, the affidavit still set forth ample evidence from which to find probable cause. Bondi's other arguments about "misstatements and omissions" contained in Rauchet's affidavit essentially amount to alternative explanations for Rauchet's observations. Although these explanations are not necessarily wholly implausible, they do not undermine the notion that there was at least probable cause upon which the warrant could issue. We therefore reject this challenge.

3. Partial Sequestration of an Anonymous Jury

Peter Gotti contends that the district court erred in empaneling an anonymous and partially sequestered jury.[17] The other defendants-appellants presumably join in this argument as well.

The parties agree that in this Circuit, a court may order the empaneling of an anonymous jury upon "(a) concluding that there is strong reason to believe the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected." *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir.1991). "Within these parameters, the decision whether or not to empanel an anonymous jury is left to the district court's discretion." *Id.*

Gotti does not argue that reasonable precautions were not taken to minimize prejudicial effects. Nor can he, as the precautions set forth in *Paccione*—conducting a thorough voir dire and providing the jurors with a plausible and nonprejudicial reason for not disclosing their identities, *see id.*—were followed here. The district court made use of a juror questionnaire that was jointly submitted, and instructed the jury that the special precautions had been implemented to protect them from the inquiring media.

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17. The government originally moved for an anonymous and partially sequestered jury in a letter-brief dated October 30, 2002. Their submission was accompanied by the supporting affidavit of FBI Special Agent John P. Mullaney. On January 13, 2003, the district court issued a four-page Opinion and Order granting the Government's motion and explaining its reasons for doing so.

Instead, Gotti's argument goes solely to prong one of the *Paccione* standard: whether there was strong reason to believe that the jury needed protection. Here, the case law from this Circuit makes clear that the district court legitimately found strong reason to believe that the jury needed protection, and that it therefore did not abuse its discretion by granting the government's motion. *See Paccione*, 949 F.2d at 1192 (collecting cases and stating that sufficient reason for empaneling anonymous juries has been found in cases where (a) "the defendants have been charged with grand jury tampering and the trial is expected to attract publicity"; (b) "the defendant has a history of attempted jury tampering and a serious criminal record"; (c) "there had been extensive pretrial publicity and there were abundant allegations of dangerous and unscrupulous conduct"; or (d) "the defendants were alleged to be very dangerous individuals who had participated in . . . mob-style killings and there was strong evidence of the defendants' past attempts to interfere with the judicial process") (internal citations and quotation marks omitted). Here, the district court identified the following factors as relevant to its decision: (1) that the defendants were charged with membership in a powerful crime organization, the Gambino Family; (2) that the defendants included Gotti, the alleged head of the Gambino Family (whose pretrial detention had already been ordered by the district court and affirmed by this Circuit due to "dangerousness"[18]) as well as Ciccone, a

18. In *United States v. Gotti*, 219 F.Supp.2d 296, 299-300 (E.D.N.Y.2002), a related proceeding in which the district court had upheld the pretrial detention of Peter Gotti, the district court had specifically stated that Peter Gotti was the alleged "Acting Boss of

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Gambino Family captain, whose pretrial detention had similarly been ordered by the district court due to dangerousness, *United States v. Ciccone*, 2002 WL 1575429 (E.D.N.Y. July 16, 2002); (3) that the indictment itself charged two defendants with witness tampering in connection with grand jury testimony; and (4) that there was expected to be intense media coverage and public interest in the trial. The presence of these factors unquestionably made this case one in which the district court had the discretion to empanel an anonymous and partially sequestered jury. We therefore reject this challenge as well.

III. CHALLENGES BY THE DEFENDANTS AND THE GOVERNMENT TO THE DEFENDANTS' SENTENCES

We turn finally to the challenges brought by the defendants-appellants (and, in the case of Peter Gotti, the government) to the sentences imposed by the district court in this case. As noted above, we need not address Richard G. Gotti's sentence, which was already remanded to the district court in a prior proceeding.

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the Gambino Family" and that on the basis of Second Circuit precedent, he was obliged to rule that Peter Gotti should be detained. We affirmed, while disavowing the notion of a per se rule regarding purported Mafia crime bosses, and reiterating the need for a fact-specific inquiry (which, in this case, warranted detention). *United States v. Ciccone*, 312 F.3d 535, 542-43 (2d Cir.2002).

Appendix A

A. Peter Gotti

1. Peter Gotti's Challenges to His Sentence and Forfeiture Order

Peter Gotti challenges both the length of his sentence and the $3,749,250 forfeiture order against him. With regard to his various challenges to the judicial fact-finding that influenced the calculation of his Guidelines sentence, we vacate his sentence pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir.2005), so that the district court can determine whether to resentence him.

We reject, however, his contention that the forfeiture order should be vacated and remanded for recalculation. In this regard, Peter Gotti argues solely that the order was excessive, because his RICO convictions stemmed solely from his money laundering convictions, and he was not convicted of the more lucrative aspects of the racketeering scheme, such as the ILA/MILA extortions and frauds.

Initially, we note that Peter Gotti did not raise this argument at trial. Therefore, we must review it under a plain error standard, which requires a showing that there was an error, that it was plain, that it affected substantial rights, and that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See, e.g., United States v. Williams*, 399 F.3d 450, 454 (2d Cir.2005).

Here, we do not believe that there was error, let alone plain error. Peter Gotti was convicted of racketeering and racketeering conspiracy under 18 U.S.C. § 1962. Under

18 U.S.C. § 1963(a)(3), a defendant who is convicted of 18 U.S.C. § 1962 is to forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." The district court expressly found that it was reasonably foreseeable to Peter Gotti that the racketeering enterprise in which he participated would engage in activities such as those underlying the ILA/MILA Counts. See March 26, 2004 Sentencing Tr. at 57-59. That finding is supported by the evidence adduced at trial and is sufficient to support the challenged forfeiture order. *See, e.g., United States v. Fruchter*, 411 F.3d 377, 384 (2d Cir.2005) (stating, in challenge to RICO forfeiture amount, that "[s]o long as the sentencing court finds by a preponderance of the evidence that the criminal conduct through which the proceeds were made was foreseeable to the defendant, the proceeds should form part of the forfeiture judgment").

2. The Government's Challenge to Peter Gotti's Sentence

When sentencing Peter Gotti, the district court concluded that under a preponderance of the evidence standard, Gotti was the acting boss of the Gambino Family during all relevant times, and determined that the ILA Counts, MILA Counts, Local 1 Counts, Howland Hook Counts, Molfetta Counts, Tommy Ragucci Counts, Zinna Counts, Marinelli Counts, and Alayev Counts constituted relevant conduct. March 26, 2004 Sentencing Tr. 40, 70-86. The district court also said that it was going to impose a leadership role enhancement under U.S.S.G. § 3B1.1 to reflect Gotti's leadership role in

the enterprise. *Id.* at 67-72. When the sentencing resumed several weeks later, however, the district court stated that it had changed its mind, and although it still considered the various counts listed above to constitute "relevant conduct" for sentencing purposes, it was no longer convinced that the leadership role enhancement was warranted. April 15, 2004 Sentencing Tr. 10-20.

The government argues that this change in position constituted error on the district court's part. It acknowledges that the Guidelines are now advisory, and that Peter Gotti's sentence will in any event be remanded to the district court under *Crosby*, at which point the district court may ultimately choose to impose a non-Guidelines sentence. It argues, however, that appellate review is still warranted at this juncture, so that the district court will—in the context of reconsidering Peter Gotti's sentence under *Crosby*—be able to start with the correct calculation of his Guidelines sentence. We agree that, in the interest of efficiency, it is appropriate for us to address this issue now.

To evaluate the government's argument as to whether a leadership role enhancement had to be imposed under the Guidelines, it is first necessary to look at the text of U.S.S.G. § 3B1.1. U.S.S.G. § 3B1.1(a) provides for a four-level enhancement if "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(b) provides for a three-level enhancement if "the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive."

The commentary to this section is also instructive. First, the introductory commentary notes that "[t]he determination of a defendant's role in the offense is to made on the basis of all conduct . . . and not solely on the basis of elements and acts cited in the count of conviction." Second, Application Note 2 provides that "[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization." U.S.S.G. § 3B1.1 app. n. 2. Third, Application Note 4 provides that "[i]n distinguishing a leadership and organizational role from one of mere management or supervision, titles such as 'kingpin' or 'boss' are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1 app. n. 4. Finally, the "background" states that "[t]his adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate."

Appendix A

In explaining why it had decided not to impose a leadership enhancement on Gotti, despite finding him to have been the "acting boss" and despite finding the various uncharged conduct to constitute "relevant conduct" for sentencing purposes, the district court explained that it did not "think it automatically follows that because somebody is the acting boss of the crime family that he's responsible for these four level enhancements in each and every relevant conduct scenario." April 15, 2004 Sentencing Tr. 11. The district court referred to Application Note 4's statement that "titles such as kingpin or boss are not controlling," and its emphasis on actual decision-making authority. It concluded:

> The court understands this application note to mean that it is not enough for the government simply to establish that Mr. Gotti held the position of acting boss, but rather it must present some evidence to show an active role in his participation. Applying the application note factors, the Court notes that none of them support—well, maybe with the exception of one, support the finding that Mr. Gotti was an organizer or leader within the meaning and intent of the guideline provision. . . .
>
> The specific evidence put forward in this case strongly suggested that Peter Gotti did not exhibit typical leadership characteristics that one would expect of the acting boss of a New York crime family, but was simply filling a power vacuum brought about by the incarceration of other members of the Gotti family. . . .

> There's simply no evidence before the Court that Mr. Gotti exercised decision-making authority in the commission of these crimes constituting the relevant conduct, that he participated in their commission. There's nothing. In fact, the evidence shows that he did not participate in their commission. . . . That he recruited any accomplices for those particular crimes, that the tribute payments he received amounted to a larger share of the fruits of the crime [,] is debatable.

Id. at 13-15.

On appeal, the government urges us to find error in the district court's refusal to impose the four-level enhancement. This Circuit has not always been consistent in describing the standard of review for such determinations, *i.e.*, whether we review a district court's decision not to impose a leadership enhancement under a *de novo* or under a clear error standard. *See, e.g., United States v. Huerta*, 371 F.3d 88, 91 (2d Cir.2004) (collecting cases, and noting the divergence among various panels of this Court). In *Huerta*, we ultimately declined to reach the question, on grounds that we would reach the same result regardless of which standard applied. *Id.* Subsequently, we held that, as a general matter, in determining the appropriate standard of review for a district court's application of the Guidelines to the specific facts of a case, we should follow an "either/or approach," adopting a *de novo* standard of review when the district court's application determination was primarily legal in nature, and adopting a "clear error" approach when the determination was primarily factual. *See United States v.*

Vasquez, 389 F.3d 65, 75 (2d Cir.2004). Since the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which rendered the Guidelines advisory rather than mandatory, we have continued to follow this "either/or" approach. *See, e.g., United States v. Selioutsky*, 409 F.3d 114, 118-119 (2d Cir.2005) (explaining that "even under the post- *Booker* sentencing regime, calculation of a correct Guidelines sentencing range will normally be part of the process of determining an appropriate sentence"; that our appellate review of a sentence will therefore include an evaluation of the district court's Guidelines calculation; and that in performing such an evaluation, we will "review issues of law *de novo*, issues of fact under the clearly erroneous standard, [and] mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual") (internal citations omitted).

In this case, we believe that the clear error standard is appropriate, because the district court's application of U.S.S.G. § 3B1.1 to the facts of this case presents an issue that is predominantly factual rather than legal. Indeed, although the government asserts in its brief that "there is no dispute about the relevant facts" and therefore suggests that de novo review is appropriate, the government has basically devoted its argument to disagreeing—by reference to other evidence—with the district court's determination that Peter Gotti did not exercise a sufficient level of control over the enterprise to be deemed an organizer or leader of the

enterprise.[19] Regardless of whether we would have reached the same decision were *a de novo* standard to apply, we do not believe that the district court committed clear error here.

B. Ciccone

Pursuant to *United States v. Fagans*, 406 F.3d 138 (2d Cir.2005), we vacate Ciccone's sentence and remand his case for resentencing.[20] We note that Ciccone has raised numerous arguments as to the district court's calculation of his Guidelines sentence, and that he also asserts that certain of these arguments similarly invalidate the restitution and forfeiture orders imposed against him. Rather than addressing those issues at this juncture, we believe that the more prudent course is to let the district court pass upon them in the first instance when resentencing Ciccone. *See, e.g., Fagans*, 406 F.3d at 141 & n. 2. Because these arguments are also the bases of some of his challenges to his restitution and forfeiture orders, the district court, if it is so inclined, may revisit those calculations as well.[21]

---

19. For example, although the district court found that there was "no evidence before the Court that Mr. Gotti exercised decision-making authority in the commission of these crimes," April 15, 2004 Sentencing Tr., the government argues in its brief that Peter Gotti's position as acting boss "entailed substantial control over the criminal activities of the Gambino family rank and file," including "supervis[ing] extortionate activity by the Gambino Family."

20. Ciccone's sentence is remanded pursuant to *Fagans* rather than *Crosby* because, as both Ciccone and the government agree, Ciccone (unlike Peter Gotti) objected, prior to sentencing, to the compulsory application of the Guidelines.

21. We do note, however, that to the extent Ciccone argues that the restitution and forfeiture orders violate the Sixth Amendment

(Cont'd)

Appendix A

C. Bondi

Bondi and the government are in agreement that Bondi, like Ciccone, is entitled to resentencing pursuant to *Fagans*. We therefore vacate Bondi's sentence and remand his case for resentencing.

IV. CONCLUSION

We have considered all of the defendants-appellants' contentions on these appeals and have not found any basis for reversing their convictions. In light of the Supreme Court's decision in *Booker* and this Court's decisions in *Crosby* and *Fagans*, we remand Peter Gotti's sentence to the district court for consideration of whether to resentence pursuant to *Crosby*, and we remand Ciccone's and Bondi's sentences to the district court for resentencing pursuant to *Fagans*.

(Cont'd)

because they were based on factual findings made by the district court under a preponderance of the evidence standard, that argument has already been considered and rejected by this Circuit. *See United States v. Reifler*, 446 F.3d 65, 113-20 (2d Cir.2006) (holding that the Sixth Amendment right to a jury trial is inapplicable to restitution imposed under the Mandatory Victims Restitution Act); *Fruchter*, 411 F.3d at 380-83 (same, for forfeiture).

APPENDIX B — EXCERPTS OF TRANSCRIPT FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Hon. Frederic Block, Presiding
United States v. Gotti et al, 02-cr-00606

Pretrial Conference With Decisions
On Motions To Dismiss
Dated December 20, 2002

[Commencing at page 60]

* * *

THE COURT: Yes. Then you have this issue of whether or not you can charge a crime composed of the [61] deprivation of so-called democratic rights. You can. My understanding of where the circuit is at in that respect is reflected in United States v. Bolomo, 176 F.3rd 580, specifically at 592 to 593.

MR. MITCHELL: I don't disagree with that. The reason principally this is raised, the Supreme Court is going to hear—

THE COURT: You want to preserve your rights.

MR. MITCHELL: Right.

The Supreme Court is going to reach in NOW vs. Schindler—

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THE COURT: Do you need what I said? I said I refer to United States v. Bolomo, which is 76 F.3rd 508 at pages 592 to 593. Then Mr. Mitchell said he was just preserving the record, agrees that is the position of the Second Circuit and that apparently certiorari has been granted.

MR. MITCHELL: In the case of NOW v. Schindler, it was a civil RICO case in which the National Organization Of Women went after antiabortionists and the predicates that they used were Hobbs Act, saying it was deprivation of property to deprive woman of abortional services.

The Court is going to hear the issue on whether or not that's a sufficient property right to justify Hobbs [62] Act.

THE COURT: It is wise of course of counsel to preserve your rights. I don't see where this case dealing with deprivation of union benefits is quite the same thing as the NOW case. We'll see how it washes out. The issues is preserved.

I read another case by the Second Circuit as reinforcing the position that the indictment properly alleges deprivation of property rights, United States v. Arena at 180 F.3d, 380, at page 392. That also is a 99 Second Circuit decision. That talks about the Hobbs Act being not limited to tangible things but includes intangible assets, such as the right to solicit customers and conduct unlawful business.

You have a proper record.

* * * *

Appendix B

Decision on Post-trial Motions By Defendants for Judgment of Acquittal, Rendered At Sentencing Proceeding Of Co-Defendant Peter Gotti Dated March 26, 2004

[Commencing at page 11]

* * *

[The Court]

But let me tell you my take on *Scheidler.*

The defendants assert that the Supreme Court's opinion in *Scheidler*, which I'll reference for the record is recorded at 537 U.S. 393 (2003), requires judgments of acquittal on all counts relating to the Hobbs Act that involve intangible property rights. Of course we are talking about relevant concepts here. The focus of the Court's decision in *Scheidler* was not on the intangible nature of the rights at issue, but whether the petitioners had attempted to obtain respondent's property. Indeed, the *Scheidler* Court explicitly noted that its decision did not reach "lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1969, decision of the Second [12] Circuit, in which the Second Circuit concluded that the *intangible right to solicit renewal collection accounts 'constituted property within the Hobbs Acct definition.'*" We are referring to Footnote 6 in *Scheidler*, at page 402 of the Supreme Court's decision. That's significant because one can cull from that that the Supreme Court was not sweeping so broadly as to vitiate traditional Hobbs Act prosecutions.

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The holding *of Scheidler* specifically was that, in order to find extortion under the Hobbs Act, the defendant must pursue or receive something of value from his victim which he can exercise, transfer or sell. Those words, "exercise, transfer or sell," were the trigger words that were used by the Supreme Court.

Now, the opinion thus overruled, as I've just indicated, the holding in Arena, which did not require that type of control over property. In *Scheidler*, the petitioners, while attempting to prevent the respondents from exercising their so-called intangible rights to seek and perform medical services, were not seeking to obtain those rights for themselves. They had no interest in performing abortions or providing any services at the clinic. That was the finding as I read *Scheidler* which really triggered the Supreme Court's decision.

I think that's something entirely different than [13] what we have in this case, which is a more traditional classic Hobbs Act criminal prosecution.

The defendants argue that they did not obtain any property in this case that could be exercised transferred or sold and that therefore their Hobbs Act convictions cannot stand. Now I disagree.

I will note first that the Supreme Court hasn't really placed the spotlight on what constitutes intangible property rights and there may be other chapters that will be written, and who knows, they may place constraints upon what they perceive to be the type of property rights that come under

the umbrella of the Hobbs Act. But we do have the guidance in *Tropiano* which suggests that these types of intangible rights still will hold water under the law. Whether or not at some future time some court may say that intangible property rights do not extend to freedom of speech or the exercise of democratic voting rights, I don't know. That wasn't really before the court in *Scheidler*.

What I do know in this case is that we have here what was missing in *Scheidler*, namely, the acquisition or the opportunity to exercise, transfer or sell something of value, which came about as a result of the criminal conduct which the defendants have been charged and convicted of by and large.

[14] So I say that the defendants in this case were not merely seeking to deprive others of their ability to exercise their rights. On the contrary, the defendants were seeking to obtain the rights of their victims and to then exercise them for their own financial gain.

Thus, for example, in Racketeering Act One, the relevant defendants not only prevented union members from exercising their right to participate in union democracy, but also obtained and exercised that right so that an organized crime associate would be elected to a leadership position. It was important to obtain that right, however you want to conceptualize that right, so that the defendants would have something that would be able to be used by them and exercised by them. That makes this entirely different than the abortion clinic scenario in *Scheidler*.

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Going further, in Racketeering Act Two, the relevant defendants not only prevented union members from exercising their rights to have MILA fiduciaries discharge their duties in MILA's best interest, but also obtained and exercised that right so that MILA fiduciaries discharged their duties in the interests of the defendants.

In Racketeering Act Three, the relevant defendants not only deprived Local 1 Checkers union [15] members from enjoying the loyal services of their elected union officials but also obtained and exercised that right to cause the union officials to instead serve the interests of the defendants.

Now, I have a little ways to go, but I just want to say that all of you are standing professionally silent while I do my job. You will obviously have plenty of time to interact when we come to the sentencing matter. I am not inviting any oral discourse here because I have just gone through all of your papers very carefully. We have had many discussions throughout the course of these proceedings. I respect your professionalism in letting me speak without interruption

In Racketeering Act Twenty-Three, the relevant defendants not only deprived Tommy Ragucci of his right to his job, but also obtained and exercised that right to give the job to someone else.

I also note that much of what I am saying deals with concepts of relevant conduct rather than what Mr. Gatti was convicted of specifically in terms of money laundering, but it all goes into our web of matters that must be considered, and we'll be talking about, of course, relevant conduct in due time.

Appendix B

In Racketeering Act Twenty-Six, the relevant defendant not only deprived Eddie Ayalev of control of the [16] operation of his business, but also obtained and exercised that right to take over a portion of that business and run it for their own benefit and profit.

In Racketeering Act Twenty-Seven, the relevant defendants not only attempted to deprive Steven Seagal from exercising his right to make business decisions regarding his film career, but sought to obtain and exercise that right to make business decisions from which they would profit, There is no question there. I think it was $700.000 that they wanted to have paid. That was really to benefit one of the people involved with the doings of the Gambino Family.

It is thus clear that the defendants here, unlike, once again, those in *Scheidler*, obtained something of value in the intangible property rights at issue, which they then proceeded to exercise for their own financial gain. Accordingly, reliance on *Scheidler* is misplaced.

We'll look forward to seeing what the Second Circuit says and whether it constricts the concept of "intangible property rights," but at the present time, I think what I have ruled here is in accordance with Second Circuit law and has not been countermanded by *Scheidler*.

Now, there has been mention made in your submission that the court should have submitted special verdict questions in light of *Scheidler* to facilitate [17] focused argument, that perhaps some of these counts were within *Scheidler*'s embrace while others may not have been within *Scheidler*'s embrace.

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I intentionally decided not to do that for a couple of reasons, one of which is because the defendants, as the government points out, wanted to have a general verdict rather than the special verdict format. Then as a practical matter, in addition to the fact that I thought I was correct in my assessment of the law then, and I still hold true to that, the jury had 40 pages. And how many questions did they have to answer? Well over a hundred. If I would have submitted yet additional questions, they would have had another 10 or 15 pages. I mean, I haven't counted up how many additional questions the jury would have had to deal with. They were overwhelmed as it was. I just felt exercising my discretion, which I would have even if there was only one or two questions to submit to the jury under these circumstances, given the challenge to the jury to have to go through 40 pages, I was not going to burden them with many, many additional questions which I suspect I would have had to present to them if I were going to discretely set forth special questions here as a result of *Scheidler*. So, I just thought I would explain to you what was going on in my mind.

I think the government is quite correct that I really, in any event, accommodated the defendant. The defendant obviously thought it was best served to have a general verdict, which is what usually is the case. The defendants usually prefer that, I think the combination of the extraordinary nature of the complexity of the indictment, the many questions that the jury had to answer, plus the fact that I thought I was correct under *Scheidler*, plus the fact that it was the defendant's preference to have a general verdict. I am comfortable that we have done it correctly.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 19, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Number:	04-2746-cr
Short Title:	USA v. Gotti
DC Docket Number:	02-cr-606
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable Frederic Block

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of October two thousand six.

04-2476-cr(L),04-4217-cr(CON),04-2960-cr(XAP),04-4842-cr(CON),04-5071-cr(CON),06-0726-cr(CON).

United States of America,

Appellee-Cross-Appellant,

v.

Primo Cassarino, Jerome Brancato, Peter Piacenti, Anna Eylenkrig, Thomas Lisi, Carmine Malara, Jerome Orsino, Frank Scollo, Vincent Nasso, Anthony Pansini, Julius R. Nasso, Salvatore Cannata,

Defendants,

Appendix C

Peter Gotti,

Defendant-Appellant-Cross-Appellee,

Anthony Ciccone, also known as Sonny, Richard Bondi, Richard G. Gotti,

Defendants-Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Peter Gotti. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: s/ Tracy Young
Motion Staff Attorney

Supreme Court, U.S.
FILED
MAY 18 2007
OFFICE OF THE CLERK

No. 06-994

In the Supreme Court of the United States

ANTHONY CICCONE, AKA SONNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner and his co-conspirators committed extortion, within the meaning of the Hobbs Act, 18 U.S.C. 1951(b)(2), by wrongfully using threats of force, violence, and fear to obtain from union members their statutory rights to free speech and democratic participation in union affairs.

2. Whether, with respect to one of petitioner's convictions for extortion under the Hobbs Act, the evidence was sufficient to show that petitioner extorted monetary payments from the alleged victim.

3. Whether the interstate commerce element of a money laundering offense, under 18 U.S.C. 1956 (2000 & Supp. IV 2004), may be satisfied by proof of the effect on commerce of the criminal activity that generated the proceeds that were laundered.

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In the Supreme Court of the United States

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ANTHONY CICCONE, AKA SONNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-113a) is published at 459 F.3d 296.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2006. A petition for rehearing was denied on October 19, 2006. The petition for a writ of certiorari was filed on January 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18

U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); nine counts of conspiring to commit extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; 11 counts of extortion or attempted extortion, in violation of 18 U.S.C. 1951; 10 counts of wire fraud, in violation 18 U.S.C. 1343 (Supp. IV 2004); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); seven counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i); two counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955; and one count of witness tampering, in violation of 18 U.S.C. 1512(b) (2000 & Supp. IV 2004). He was sentenced to 180 months of imprisonment. In addition, he was ordered to pay restitution in the amount of $1,601,499, and to forfeit the amount of $1,636,499. Pet. App. 44a. The court of appeals affirmed the convictions, but vacated the sentence in light *United States* v. *Booker*, 543 U.S. 220 (2005), and remanded for resentencing.

1. The evidence at trial established the existence of a wide-ranging criminal enterprise involving the Gambino organized crime family. By extortionate means, the enterprise exercised influence over labor unions, businesses, and individuals operating at the piers in Brooklyn and Staten Island. Pet. App. 4a. The enterprise also ran the New York branch of a Costa Rican bookmaking business and a large-scale gambling operation that employed joker-poker electronic gambling devices. *Id.* at 35a-39a. Petitioner was a captain in the Family and a leading participant in its extortion and gambling activities. *Id.* at 4a. The enterprise used force to fill various leadership positions in the International Longshoremen's Association (ILA) with organized crime associates, and then by fraudulent means and oth-

erwise it proceeded to deprive union members of wages, benefits, and rights guaranteed to them by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 *et seq.* Pet. App. 6a-9a. Through its resulting control of the ILA's national health plan, it was able to award the plan's lucrative pharmaceutical services contract to a company partially owned by a Family associate. *Id.* at 9a-12a. The enterprise obtained influence over Local 1 of the ILA by extortion and over Local 1814 through its control of the local's president, Frank Scollo. In each case, it defrauded the local membership of wages, benefits, and rights. *Id.* at 13a-16a.

The enterprise also extorted sizeable, quarterly cash payments from Carmine Ragucci, the owner of Howland Hook Container Terminal. Scollo, the mob-controlled president of Local 1814, would collect the payments and pass them to petitioner directly or through a third-party. When Ragucci was late with a payment, petitioner would be "pissed off" and Scollo would convey petitioner's displeasure to Ragucci. Scollo believed the payments were "illegal" and therefore conducted the transmissions in a surreptitious manner. Neither Scollo nor Ragucci's brother Tommy, who worked with him at Howland Hook, knew of any legitimate reason for the payments. Pet. App. 16a-18a, 75a; Gov't C.A. Br. 25-27.

The enterprise also extorted monthly $1,500 payments from Frank Molfetta, the owner of a trucking company that did business with Howland Hook, Pet. App. 18a-19a; ordered Ragucci's brother Tommy to resign from his position at Howland Hook so that the position could be filled by a Family associate, *id.* at 26a-28a; extorted $5000 from Leonardo Zinna after learning that Zinna had charged two people $3000 each for waterfront

jobs, *id.* at 28a-29a; forced Nicola Marinelli to pay a portion of the workmen's compensation payments he received, *id.* at 29a-30a; and ordered Eduard Aleyev, the owner of a café in Brooklyn, to make monthly $1000 payments and to install illegal gambling machines in his restaurant, *id.* at 30a-32a. It used violent threats in an attempt to obtain money from the actor Steven Seagal and to get him to do business with the enterprise. *Id.* at 32a-35a.

Lower-ranking members of the Gambino Family used the proceeds of the enterprise's extortion and gambling activities to pay "tributes" to the Family's higher-ranking members, including petitioner. Pet. App. 20a-26a. Petitioner both received money and paid a portion of the money he received to co-defendant Peter Gotti, who was the acting boss of the Family. *Id.* at 77a. Petitioner tampered with government witness Anthony Frazetta, who subsequently invoked his Fifth Amendment privilege before the grand jury. *Id.* at 39a-40a.

2. The Hobbs Act, 18 U.S.C. 1951(a), makes it a crime to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by * * * extortion or [to] attempt[] or conspire[] so to do." The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2).

In this case, the ILA- and Local 1-related counts alleged that petitioner obtained the property of union members, including (1) union positions, money paid as wages and employee benefits, and other economic benefits that union members would have received but for the defendants' corrupt influence over the union; (2) the

right of union members to free speech and democratic participation in the affairs of the union as guaranteed by the LMRDA, 29 U.S.C. 411 and 481; and (3) the right of union members, under the LMRDA, 29 U.S.C. 501(a), to have the officers and agents of the union manage the money, property, and financial affairs of the union free of threatened force, violence and fear. See Pet. App. 6a-7a, 13a.

3. The substantive money laundering statute makes it a crime knowingly to conduct a "financial transaction" using "the proceeds of some form of unlawful activity" either "with the intent to promote the carrying on of specified unlawful activity," or with knowledge that the transaction is designed "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." 18 U.S.C. 1956(a)(1), (a)(1)(A)(i) and (B)(i). The "financial transaction" must "in any way or degree affect[] interstate or foreign commerce." 18 U.S.C. 1956(c)(4)(A). Section 1956(h) makes it a crime to conspire to commit a substantive money laundering offense. The money laundering counts in this case alleged that the enterprise laundered the proceeds of its extortion and gambling activities by transferring them to the upper-level members of the Gambino Family with the intent to promote criminal activity and for concealment. See Pet. App. 20a, 77a.

4. Insofar as relevant here, petitioner raised the following claims on appeal:

a. Petitioner contended, first, that this Court's decision in *Scheidler* v. *NOW*, 537 U.S. 393 (2003), invalidated the Hobbs Act counts in the indictment that were based on the extortion of intangible property rights. The court of appeals declined to read *Scheidler* to hold that a Hobbs Act violation could not be premised on the

extortion of intangible property rights. Pet. App. 2a, 53a. Rather, the court understood *Scheidler* as clarifying that, in order to violate the Hobbs Act, a person must not only seek to deprive the victim of property, but also seek to obtain the property for himself. *Id.* at 2a-3a, 53a. Thus, the court concluded that the applicable inquiry with respect to each of the challenged extortion counts was whether "[petitioner was] (1) alleged to have carried out (or, in the case of attempted extortion, attempted to carry out) the deprivation of a property right from another, with (2) the intent to exercise, sell, transfer, or take some analogous action with respect to that right." *Id.* at 56a.

Applying this test, the court upheld the ILA- and Local 1-related counts, because the indictment charged not only that petitioner caused the relinquishment of the union members' LMRDA rights, but also that he did so in order to exercise those rights in a way that would profit the criminal enterprise financially. Pet. App. 57a. The court rejected the argument that petitioner could not obtain the union members' LMRDA rights because those rights may not be exercised by third parties, holding that property is obtainable for Hobbs Act purposes regardless of whether its use, transfer, or sale would be legal. *Id.* at 57a-59a.

b. Next, petitioner contended that the evidence failed to establish that petitioner obtained Carmine Ragucci's cash payments by extortion. The court of appeals held that a reasonable jury could find that the payments were extorted based on the evidence that Scollo conveyed to Ragucci petitioner's "displeasure" when the payments were late; the "highly surreptitious" manner in which the cash transmissions were conducted; Tommy's testimony that he knew of no legiti-

mate reason for the payments; and Scollo's testimony that "he knew his involvement was 'not the proper thing to do.'" Pet. App. 75a.

c. Petitioner also contended that the evidence was insufficient to support his conviction on the money laundering counts in that it failed to establish that the charged laundering transactions, consisting of the tribute payments to upper-level members of the Gambino Family, affected interstate or foreign commerce. The court of appeals rejected this claim on three separate grounds. First, it reasoned that the underlying extortion and gambling offenses affected commerce. Second, it reasoned that the tribute payments themselves affected commerce by promoting the underlying extortion and gambling activities. Finally, it reasoned that the tribute payments affected commerce by promoting the Gambino Family's overall operation, "which clearly affects interstate commerce." Pet. App. 83a.

ARGUMENT

1. Petitioner challenges the intangible-property-rights theory underlying his Hobbs Act convictions on the ILA- and Local 1-related counts, which alleged that he obtained by extortion the free speech and democratic rights of union members. First, he contends (Pet. 13-18) that the intangible rights of free speech and democratic participation in the affairs of a union do not qualify as "property" within the meaning of the Hobbs Act, 18 U.S.C. 1951(b)(2). In addition, he contends (Pet. 19-21) that, even if such rights do qualify as property, they are not "obtain[able]" within the meaning of the Hobbs Act, 18 U.S.C. 1951(b)(2).

a. The court of appeals correctly held that a union member's intangible rights under the LMRDA qualify

as "property" for Hobbs Act purposes, and that holding does not conflict with any decision of this Court or another court of appeals. This Court's review of that claim is therefore unwarranted.

i. It is well established that the concept of "property" under the Hobbs Act is not limited to tangible property, but encompasses intangible property as well, including "any valuable right considered as a source or element of wealth." *United States* v. *Tropiano*, 418 F.2d 1069, 1075-1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). See, *e.g.*, *United States* v. *Arena*, 180 F.3d 380, 393 (2d Cir. 1999), cert. denied. 531 U.S. 811 (2000); *Libertad* v. *Welch*, 53 F.3d 428, 444 n.13 (1st Cir. 1995); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916, 450 U.S. 985, and 452 U.S. 905 (1981); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973).

Moreover, the other courts of appeals that have considered the issue have held, like the Second Circuit here, that the intangible rights of union members under the LMRDA qualifies as "property" for purposes of the Hobbs Act. See *United States* v. *Debs*, 949 F.2d 199, 202 (6th Cir. 1991), cert. denied, 504 U.S. 975 (1992); *United States* v. *Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); see also, *e.g.*, *United States* v. *International Bhd. of Teamsters*, 708 F. Supp. 1388, 1398-1399 (S.D.N.Y. 1989); *Dusing* v. *Nuzzo*, 29 N.Y.S.2d 882 (Sup.

Ct.), modified on other grounds and aff'd, 31 N.Y.S.2d 849 (App. Div. 1941) (holding that rights incident to union membership are protected property interests). As the court explained in *Dusing*, 29 N.Y.S.2d at 884:

> The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, * * * he has an equally enforcible property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution.

ii. As petitioner acknowledges, *Scheidler* does not preclude the applicability of the Hobbs Act to extortionate conduct to obtain intangible property rights. In *Scheidler*, the respondents successfully sued the petitioners claiming that the petitioners were part of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity that included acts of extortion in violation of the Hobbs Act. The petitioners contended that their conduct did not constitute extortion within the meaning of the Act. This Court stated that "[t]here is no dispute * * * that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights." 537 U.S. at 404. The Court concluded, however, that the petitioners' conduct did not constitute extortion because they did not "obtain" the clinics' property within the meaning of the Hobbs Act. *Id.* at 409. The Court explicitly declined to decide the "outer boundaries" of Hobbs Act liability for obtaining

intangible property rights, *id.* at 402, and it stated that it was not "reject[ing]" lower court decisions, "such as * * * *Tropiano*," holding that intangible rights may constitute "property" under the Hobbs Act, *id.* at 402 n.6.

iii. Petitioner's reliance (Pet. 17-18) on this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), interpreting the mail fraud statute is also misplaced. In *McNally*, the Court held that mail fraud convictions could not be based on the theory that a public official's conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the statute. Subsequently, in *Carpenter* v. *United States*, 484 U.S. 19 (1987), the Court made clear that the property protected by the mail fraud statute includes intangible as well as tangible property. The Court held in *Carpenter* that a conspiracy to trade on an employer's confidential business information is "property" within the reach of the mail fraud statute.

As an initial matter, the Court's analysis in *McNally*, which focused on the legislative history of the mail fraud statute and concerns of federalism, is not readily transferable to the Hobbs Act context. The *McNally* Court concluded that the mail fraud statute was enacted to criminalize the use of the mails to swindle the public, and thus construed the statute narrowly in line with that purpose, 483 U.S. at 358-360. The Court further observed that to construe the mail fraud statute to encompass the challenged conduct would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." *Id.* at 360.

The Hobbs Act, unlike the mail fraud statute, was enacted specifically to address labor racketeering. Furthermore, construing the Hobbs Act to encompass the protection of LMRDA rights would not involve the federal government in setting arbitrary standards for union conduct. That is so because the LMRDA already sets forth with particularity the standards governing the democratic rights of union members. Accordingly, "*McNally*'s federalism rationale has no analogue in the union arena." *Debs*, 949 F.2d at 201; see *International Bhd. of Teamsters*, 708 F. Supp. at 1399 ("characterizing those rights created by the federal labor statutes as 'property' does not involve the federal government in setting arbitrary standards for conduct in the way that the same characterization of the ethereal and changeable notions of 'good government' and 'honest and faithful services' would"). For that reason alone, petitioner's claim of a conflict with mail fraud cases (Pet. 17-18) is misplaced.

Even assuming that *McNally* were to apply in the Hobbs Act context, the LMRDA rights implicated in this case are more akin to the intangible rights held protected as property in *Carpenter* than the rights held not to be property in *McNally*. The right of members to democratic participation in a union's affairs is a valuable right capable of directly affecting the members' financial status. As the court found in *Rodonich* v. *House Wreckers Union Local 95*, 627 F. Supp. 176, 179 n.2 (S.D.N.Y. 1985), LMRDA rights provide union members with a source of livelihood, and this constitutes a source of wealth much like the ordinary right to control one's business assets, which has repeatedly been held to be covered by the Hobbs Act. See, *e.g.*, *Northeast Women's Ctr.*, 868 F.2d at 1350 (right of health center to

continue to operate its business); *Tropiano*, 418 F.2d at 1075-1076 (right to solicit business); *Santoni*, 585 F.2d at 673 (right to make business decisions).

iv. Nor is petitioner's claim helped by this Court's decision in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), on which he also relies (Pet. 15-16). In that case, the Court held that a "generalized right to be secure in one's business interests" free from a competitor's false advertising about his own product is not "property" within the meaning of the Fourteenth Amendment because that right lacks the element of exclusivity. 527 U.S. at 672-673. The Court did not address, much less reject, the notion that the intangible rights of union members under the LMRDA qualify as "property" for purposes of the Hobbs Act.

b. Likewise, there is no merit to petitioner's claim that he and his cohorts did not "obtain" the union members' rights to free speech and democratic participation in union affairs, within the meaning of the Hobbs Act.

As discussed above, the Court in *Scheidler* held that a Hobbs Act violation requires "not only the deprivation but also the acquisition of property." 537 U.S. at 404. The Court found that the petitioners' deprivation of the abortion clinics' ability to exercise their property rights did not amount to extortion because the petitioners "neither pursued nor received 'something of value from' respondents that they could exercise, transfer, or sell." *Id.* at 405 (quoting *United States* v. *Nardello*, 393 U.S. 286, 290 (1969)).

In this case, the court of appeals applied the standard set forth in *Scheidler* for determining whether property has been obtained under the Hobbs Act, and it correctly concluded that the ILA and Local 1 counts

satisfied that standard. As the court explained, the indictment alleged not only that petitioner deprived the union members of their LMRDA rights, but that, in doing so, he "sought to exercise those rights [himself] by telling various delegates whom to vote for in certain leadership positions, and by controlling various elected officials' performance of their union duties." Pet. App. 57a.

Petitioner argues (Pet. 19-20) that his activities qualified not as extortion but as coercion, which the Court in *Scheidler* defined as the use of force or threats of force to restrict another's freedom of action without necessarily obtaining his property. 537 U.S. at 405. But given the "overlap" between the elements of extortion and coercion, many acts of extortion also qualify as coercion. See *id.* at 407-408. This case involves the additional ingredient that separates extortion from coercion—*i.e.*, the pursuit or receipt of the victim's rights. *Id.* at 405. Where, as here, the defendant has sought or obtained property by means of coercive acts, he has committed both crimes.

2. Petitioner contends (Pet. 21-27) that the evidence was insufficient to support his substantive and conspiracy convictions for extorting money from Carmine Ragucci, the owner of Howland Hook. Specifically, he argues that the evidence failed to establish that the purpose of the cash payments was illegitimate or that he obtained the payments through any threat or affirmative exploitation of fear.

Under the Hobbs Act, the definition of extortion is not limited "to those circumstances in which property is obtained through the wrongful use of fear created by implicit or explicit threats." *United States* v. *Abelis*, 146 F.3d 73, 83 (2d Cir. 1998), cert. denied, 525 U.S. 1069

(1998), and 525 U.S. 1147 (1999). Rather, it is enough if the defendant "knowingly and willfully create[d] or instill[ed] fear, or use[d] or exploit[ed] existing fear 'with the specific purpose of inducing another to part with his or her property.'" *Ibid.* (citation omitted).

The evidence at trial showed that Ragucci made sizeable, quarterly cash payments to Scollo, who delivered the money to petitioner directly or through a third-party in a secretive, surveillance-conscious manner because, as Scollo testified, he knew that what they were doing was illegal. Pet. App. 17a-18a. Ragucci had a strong financial backer when he opened Howland Hook and would not have needed a loan or investment from petitioner. Gov't C.A. Br. 124. Both Scollo and Ragucci's brother Tommy, who was intimately involved in Howland Hook, testified that, to their knowledge, petitioner never loaned Ragucci money and was not an investor in his shipping terminal. Pet. App. 18a.

Tommy, Scollo, and Frank Molfetta (a trucking company owner and victim of petitioner's extortion operation), each of whom was close to Ragucci and worked in the same local industry, testified at trial that they knew of petitioner's reputation as a mobster and feared him. Gov't C.A. Br. 124. Scollo testified that, when Ragucci was late with a quarterly payment, petitioner would be "pissed off" and he would direct Scollo to "make sure that guy does the right thing," and "make sure you go back and * * * get it." Scollo would then communicate petitioner's displeasure to Ragucci. Pet. App. 17a. When Ragucci wanted to place his brother Tommy in the position of hiring agent at Howland Hook, he had to consult with petitioner. Gov't C.A. Br. 124.

Viewed in the light most favorable to government, see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), the

above evidence was more than sufficient to permit the inference that Ragucci feared petitioner and that petitioner exploited that fear in order to obtain the quarterly payments. This is especially so given the overwhelming evidence establishing petitioner's pattern of extortionate conduct and his criminal relationship with waterfront unions and businesses.

Petitioner argues that, in concluding that the evidence was sufficient to show that petitioner extorted the payments from Ragucci, the court of appeals improperly shifted the burden of proof at trial to him by considering the absence of evidence of a legitimate reason for the payments. Although the court of appeals did observe that there was "no affirmative evidence" that the payments were legitimate, Pet. App. 75a, and that no legitimate reasons for the payments were presented to the jury, *ibid.*, it supported its sufficiency-of-the-evidence determination with ample record evidence, including Scollo's communication to Ragucci of petitioner's displeasure with late payments; the cash nature of the payments and the surreptitiousness of their transmission; Tommy's testimony, as a person in a position to know, that he was unaware of any legitimate purpose for the payments; and Scollo's knowledge that his involvement in collecting the payments was "not the proper thing to do." *Ibid.* Nothing in that analysis shifted the burden to petitioner; instead, it simply pointed out that nothing in the record dispelled the rational inference that the payments were the product of fear, rather than any legitimate reason.

3. The money laundering counts on which petitioner was convicted charged him with laundering the proceeds of the Gambino Family's extortion and gambling activities. The alleged money laundering transactions con-

sisted of the payment of "tributes" to the Family's leaders, including petitioner, from the proceeds of the underlying crimes. In concluding that the evidence was sufficient to establish that the money laundering offenses affected interstate or foreign commerce as required by the money laundering statute, see 18 U.S.C. 1956(c)(4), the court of appeals reasoned in part that "[t]he alleged extortion victims were businesses and unions that engaged in interstate commerce, and the gambling operations * * * were international in scope." Pet. App. 83a. Petitioner contends (Pet. 27-28) that, under this Court's decision in *United States* v. *Cabrales*, 524 U.S. 1 (1998), it is impermissible to consider the conduct that generated the laundered funds in determining whether the commerce requirement of the money laundering statute was met.

As an initial matter, the court of appeals did not rely solely on the underlying extortion and gambling activities in concluding that petitioner's money laundering offenses affected commerce. It also noted that the money laundering transactions themselves affected commerce "by promoting the activities that gave rise to [the proceeds]," and by promoting the Gambino Family's operations as a whole, which "clearly affect[ed] commerce." Pet. App. 83a. Petitioner does not take issue with these bases for concluding that the commerce requirement was satisfied. While the court considered these factors "collectively," *ibid.*, each is also individually sufficient to support the conviction.

Moreover, the partial reliance of the court of appeals on the commercial impact of the underlying criminal activity does not conflict with *Cabrales*. In *Cabrales*, the Court held that venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii) and 18 U.S.C. 1957,

is proper only in the district in which the prohibited laundering transaction occurred, and not in the district in which the laundered proceeds were unlawfully generated. 524 U.S. at 6-10. The issue of whether the underlying criminal activity may be considered in determining if the commerce requirement had been satisfied was neither raised nor addressed in *Cabrales*. Nor does the rationale of *Cabrales*—that the illicit financial transaction is the "proscribed conduct" in a money laundering offense, see *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 n.4 (1999)—preclude consideration of the underlying crime for purposes of determining whether there was an effect on commerce. To the contrary, the Court in *Cabrales* observed that the underlying offense may be regarded as an "essential element" of money laundering, and that the laundering transaction "facilitate[s]" the underlying offense or "ma[kes] it profitable by impeding its detection." 524 U.S. at 7-8. Those observations support the conclusion that the commercial effect of the underlying criminal activity can establish that a transaction involving the proceeds affected interstate commerce. See, *e.g.*, *United States* v. *Hatcher*, 323 F.3d 666, 672 (8th Cir. 2003) (relying on effect on commerce of underlying jewelry store robbery in upholding money laundering conviction); *United States* v. *Owens*, 167 F.3d 739, 753 (1st Cir.), cert. denied, 528 U.S. 894 (1999).

The court of appeals decisions on which petitioner relies (Pet. 28) do not concern the issue of whether the underlying crime may be considered in determining if a money laundering offense affected commerce. *United States* v. *Villarini*, 238 F.3d 530, 534-535 (4th Cir. 2001), like *Cabrales*, involved the issue of venue. In *United States* v. *Mankarious*, 151 F.3d 694, 705 (7th Cir.), cert.

denied, 525 U.S. 1056 (1998), the court held that a mail fraud offense may produce proceeds for purposes of the money laundering statute before any actual mailing in furtherance of the fraudulent scheme took place. And in *United States* v. *LeBlanc*, 24 F.3d 340, 346-347 (1st Cir.), cert. denied, 513 U.S. 896 (1994) the court held that, for purposes of sentencing under the Sentencing Guidelines, the particular money laundering offense at issue fell within the "heartland" of money laundering and therefore did not warrant a downward departure. Accordingly, none of those decisions supports review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2007

(3)

No. 06-994

IN THE

Supreme Court of the United States

ANTHONY CICCONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I. This Court Should Resolve the Dispute Whether Union Free Speech and Democratic Rights Are Obtainable Property Under the Hobbs Act and Under This Court's Decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003).

A. This Court Previously Granted Certiorari On the Property Issue Without Resolving It, and Should Return to Address It Here.

There is no dispute that this Court previously deemed the issue of the nature of "property" under the Hobbs Act to be worthy of intervention even if in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003) the Court ultimately decided the case on the "obtaining" issue instead. *See* Pet. 13. Respondent's arguments for why the issue should not be broached now, however, lack merit.[1]

Respondent does not dispute petitioner's citation to a split in the lower federal courts whether union democratic and free speech rights constitute property under federal criminal statutes. Respondent contends, however, (Resp. 8-9, 10-11) that the split may be disregarded because the cases cited by petitioner fall under the mail and wire fraud statutes. These cases, respondent argues, ought to be ignored because in *McNally v. United States*, 483 U.S. 350 (1987) this Court suggested that one of its reasons for limiting the mail and wire fraud statutes to schemes to deprive a victim of "property" was to avoid having the federal government involved in setting standards of behavior for state and local

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1. Respondent invokes the non-issue that *Scheidler* does not preclude application of the Hobbs Act to intangible property rights. Resp. 9. This is not and never has been the issue in this case. The property issue is whether rights to union democracy and free speech constitute "property" under the Hobbs Act. The other issue, *see* Section B, *infra*, is whether any such rights can be obtained within the meaning of the Hobbs Act.

officials, and that there is no such risk in respect to rights to union free speech and democracy. Resp. 11.

Together with the rule of lenity, the reference to federalism in *McNally* formed the Court's secondary reason for requiring a clearer statement from Congress that non-property interests (in that case, rights to honest services) would be covered under the mail and wire fraud statutes. *See* 483 U.S. at 359-60. Prior to invoking federalism, this Court considered the legal and legislative background and concluded that, while the statutes were silent on a property requirement, Congress should be deemed to have intended the prohibition on fraud to be limited to schemes directed at property. 483 U.S. at 356-59. The situation with the Hobbs Act was far different. As this Court explained in *Scheidler*, at the time of enactment, Congress was fully aware of the requirements in existing law and chose its words carefully. 537 U.S. at 406-07. Unlike with the mail and wire fraud statutes where the property requirement was not explicit and had to be read in by this Court, 483 U.S. at 358-59, the Hobbs Act contained an explicit property requirement in the statute. 537 U.S. at 407-08; 18 U.S.C. § 1951(b)(2). Thus, if anything the property requirement should be deemed more central and exacting in the case of the Hobbs Act.

Moreover, as this Court detailed in *Scheidler*, Congress was well aware of the distinction between extortion of property and coercion when enacting the Hobbs Act and deliberately chose to exclude coercion from the Act's coverage. *See* 537 U.S. at 407-08. As argued further below, the government's effort to read union democratic and free speech rights into the statute is for all intents and purposes an effort to read coercion (without any necessary deprivation of property) back into the statute. Thus, it is not enough to suggest that the Hobbs Act is about "labor" and therefore anything remotely smacking of labor impropriety ought to be deemed a violation. Were this the case, Congress, being

very careful in enacting the Hobbs Act would not have made such a point of requiring a property deprivation and excluding coercion, which would easily have lent itself to coverage of a spectrum of labor practices.[2]

Respondent further contends that the Hobbs Act was passed to address extortion in the labor context, and that labor free speech and democratic rights "are more akin to the intangible rights held protected as property in *Carpenter* [*v. United States*, 484 U.S. 19 (1987)] than the rights held not to be property in *McNally*." Resp. 11. Respectfully, the comparison is inapt. The rights in the post-*McNally* cases cited by petitioner that are rejected as not constituting property *are* union democratic and labor rights such as are at issue in this case. *See* Pet. 17-18 (citing *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989)(en banc); *United States v. Zauber*, 857 F.2d 137, 143-44 (3d Cir. 1988); *United States v. Lombardo*, 865 F.2d 155, 158-59 (7th Cir. 1989)). In contrast, *Carpenter* concerned a scheme to trade in the stock markets on the advantage of illegally procured confidential business information. Unlike labor democratic rights, as this Court explained in *Carpenter*, "[c]onfidential business information has long been recognized as property." 484 U.S. at 26 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-1004 (1984); *Dirks v. SEC*, 463 U.S. 646, 653 n.10 (1983); *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250-251 (1905)). *Carpenter* furnishes no basis whatsoever for deeming union democratic and free speech rights "property."

Respondent nowhere explains why "property" should include something seemingly as foreign as rights to free

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2. Congress, while excluding coercion from the criminal sanctions in the Hobbs Act, has prohibited coercive tactics as an unfair labor practice. 29 U.S.C. § 158(b). This is further indication that it knows when and how to address the issue without creative assistance from representatives of other branches.

speech and union democratic rights. It is not enough to suggest that such rights relate in some indirect sense to the worker's wage, because seemingly any right can be so linked. Any journalist, for example, can link free speech rights to the bottom line. The issue is not whether the right could relate to property but whether it is property. Respondent's position would obliterate any meaningful distinction between liberty and property and would presumably pave the way for increased regulation of liberty interests such as free speech where there is some argument that such rights are connected in some way to property.

Respondent declines to address the court of appeals' remarkable conclusion that "the appropriate interpretation of *Scheidler II* must be one that co-exists with [*United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969)]. . . ." App. 52a (emphasis added). Not only did this Court explicitly deem it "mistaken to suggest that our decision *reaches*, much less rejects, lower court decisions such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)," 537 U.S. at 402 n.6 (emphasis added), but as set forth in the petition (Pet. 14-15), *Tropiano*'s consciously "expansive" interpretation of the Hobbs Act is decidedly at odds with *Scheidler*'s holding that *strict* construction in the form of the rule of lenity is mandated in construing the Hobbs Act. *See* 537 U.S. at 408-09. Moreover, *Tropiano*'s conception that "[t]he right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution," 418 F.2d at 1076, conflicts with the holding of this Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) that "business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense . . ." 527 U.S. at 675. Respondent's complaint that *College Savings Bank* is not a Hobbs Act case

(Resp. 12) is both correct and beside the point that this Court should intervene to clarify whether *College Savings Bank* or *Tropiano* represents the proper conception of property under the Hobbs Act.

B. The Decision Below Conflicts With *Scheidler's* Holding that Mere Coercion or Regulation of Property Does Not Constitute an Obtaining of that Property.

Respondent contends that the decision below comports with *Scheidler's* requirement that obtaining property be the object of a charged extortion under the Hobbs Act. Resp. 12-13. But respondent nowhere even attempts to explain how petitioner with respect to union free speech and democratic rights, "pursued []or received something of value . . . that [he] could *exercise, transfer, or sell.*" *Scheidler*, 537 U.S. at 405 (emphasis added). There is no evidence that petitioner, who was not even in the union at the time, exercised, transferred or sold rights to union democracy and free speech held by any individual union member. At most, evidence showed that he sought to coerce a particular choice among those rights, just as the defendants in *Scheidler* sought to coerce a particular choice among abortion and other rights without actually exercising them. This did not constitute obtaining property under *Scheidler.*

Respondent's only attempt to distinguish *Scheidler* is to point to the "overlap" of coercion and extortion that is referenced in *Scheidler.* Resp. 13 (citing 537 U.S. at 407-08). But this Court was merely making the point that since all extortion (*i.e.* obtaining of property) will necessarily involve coercion, it was most significant that Congress chose to exclude acts of coercion alone (*i.e.* without obtaining property) from the purview of the Hobbs Act. *See id.* This supports petitioner's rather than respondent's position, because this is precisely the kind of case that involves coercion alone. As this Court stated in words squarely

applicable here, "[t]he crime of coercion . . . involves the use of force or threat of force to restrict another's freedom of action." 537 U.S. at 405. Any conceivable doubt is removed by the New York State examples of coercion but not extortion that this Court cited, and which are clearly of a piece with this case. *See Scheidler*, 537 U.S. at 405-06 (citing examples of coercion of a business to join a trade association, or to compel a manufacturer to enter into an agreement with a labor union, or to compel union members to drop lawsuits regarding union finances).

In a telling omission, respondent nowhere addresses *Scheidler*'s overturning of *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999), the case upon which the trial theory was premised, and which had deemed it sufficient under the Hobbs Act to "frustrate" or "regulate the fate" of property rights rather than actually obtain them. That the court that authored *Arena* would in this case fail to recognize a theory that is equally invalid under *Scheidler* indicates that the message of *Scheidler* has not been received, and for this and the other reasons stated above, this Court should intervene.

II. The Conclusion of the Court of Appeals that Hobbs Act Extortion Can Be Founded On Unexplained, "Suspicious" Payments Dangerously Expands the Offense and Shifts the Burden of Proof.

The court of appeals' overbroad conception of obtaining property combines with unconstitutionally minimalist and burden-shifting requirements for proof of extortion, and together present a dangerous Hobbs Act that potentially applies to all manner of conduct at the discretion of prosecutors and unfettered by any meaningful standards enacted by Congress. While respondent would treat the court of appeals' wholly dangerous holding regarding the Carmine Ragucci extortion counts as quibbling over evidentiary facts, by statement and implication respondent actually underscores

the reasons why this Court should intervene on this in addition to the other Hobbs Act issues presented.

Respondent nowhere denies the two conflicts with other courts of appeal that are presented here, and its arguments against intervention actually demonstrate why intervention is appropriate. Respondent does not dispute petitioner's contention that reliance in the decision below on defendant's failure to affirmatively demonstrate any "legitimate" reason for the payments in question conflicts with the Eleventh Circuit's decision in *United States v. Fernandez*, 892 F.2d 976, 986 n.9 (11th Cir. 1990) holding that such a line of reasoning on sufficiency review improperly shifts the burden of proof to defendant. Indeed, respondent's denial that the burden of proof was shifted to defendant actually confirms petitioner's point. Respondent, like the court below, is unable to muster the "ample" proof without relying on petitioner's failure to come forward with proof of "any legitimate purpose for the payments." (Resp. 15). Even the configuration that "nothing in the record dispelled the rational inference that the payments were the product of fear, *rather than any legitimate reason*" (Resp. 15) (emphasis added) is unable to avoid the inherent burden shifting also seen in the analysis below. Petitioner, after all, was the only party to this case with any conceivable interest in demonstrating a "legitimate reason" for the payments, so there can be no denying that reliance on the absence of proof of legitimacy necessarily faults petitioner for failing to shoulder a burden inappropriately placed upon him.

Nor does respondent dispute the conflict between the decision below and that of multiple decisions of various courts of appeals that the mere conclusion that "something" illegal was happening without actual proof of the specific crime charged is insufficient to constitute proof beyond a reasonable doubt. *See* Pet. 24-25. Again, respondent helps to demonstrate petitioner's point that the court of appeals'

decision transmogrifies "extortion" under the Hobbs Act into a federal, unexplained and suspicious money transfer statute. While nowhere disputing that there was no evidence of the purpose of the payments in question or that the payer was placed in any fear whatsoever, respondent cites "ample record evidence" of an extortion from surreptitious cash payments, displeasure when they were late, the absence of proof of a "legitimate purpose" and the subjective opinion of one witness (who disclaimed actual knowledge of the purpose of the payments) that some unidentified thing was "not . . . proper." Resp. 15. Such generic facts emcompass a broad spectrum of potential behavior ranging from legal, to suspicious to illegal, but not one that could conceivably and reasonably be characterized as extortion as Congress has defined it beyond a reasonable doubt. Congress has not enacted a federal suspicious payment statute, and this Court ought to be concerned that one has been created out of the Hobbs Act in this case.

III. The Court of Appeals Applied a Standard Rejected By this Court to the Interstate Commerce Element of the Money Laundering Counts.

The court of appeals has concluded decisively that with respect to establishing an interstate commerce effect on money laundering counts "it is indeed permissible to consider the conduct that gave rise to the laundered funds." App. 81a-82a. While this Court's decision in *United States v. Cabrales*, 524 U.S. 1, 7 (1998) concerns venue as respondent correctly notes (Resp. 16-17), *Cabrales*' holding that the money laundering statutes "interdict only the financial transactions . . . not the anterior criminal conduct that yielded the funds allegedly laundered" is squarely inconsistent with the court of appeals' conclusion in this case. Under the statute it is those transactions and not the underlying activity that must affect interstate commerce. *See* 18 U.S.C. § 1956(c)(4). Respondent's citation to its argument as a party in the

Cabrales case that the underlying offense "might be said . . . [to be] an essential element" of the subsequent laundering (Resp. 17; citing 524 U.S. at 7-8) did not persuade this Court to lay venue based on the underlying conduct in that case, nor should that failed argument apply to the interstate commerce clause nexus. In the end the Court is presented with a decision below, as contrasted with other circuits, (Pet. 28), that would disregard the teaching of *Cabrales*.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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